IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1982

No. 82-5433

YVONNE CAVANAUGH, d/b/a THE TOT COLLEGE, APPELLANT

VS.

STATE OF COLORADO, DEPARTMENT OF SOCIAL SERVICES, Appellee

- -

ON APPEAL FROM THE SUPREME COURT OF COLORADO

- -

JURISDICTIONAL STATEMENT

- -

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APPLICABLE LAW, etc.

PIBLICAL LAW:

The Holy Bible, Ephesians, 6, Verses 1, 2 and 3

The Holy Bible, Colossians, 3, Verse 20

CONSTITUTION OF THE UNITES STATES OF AMERICA:

Amendments one, four five, nine and fourteen

Article III, Section 2, Paragraph 2

Article IV, Section 4

UNITED STATES CODE:

20 U.S.C. 1232g-(b) (1)

28 U.S.C. 1257 (2)

COLORADO REVISED STATUTES:

Colorado Revised Statutes 1973, 1-40-115

Colorado Revised Statutes 1973, 24-4-101 et seq.

Colorado Revised Statutes 1973, 26-6-101 et seq.

Colorado revised Statutes, 1973, 26-6-108 (3)

Colorado Revised Statutes, 1973, 26-6-112

COURT RULES:

Colorado Appellate Rules, 21

Colorado Rules of Civil Procedure, 6(b)

Colorado Rules of Civil Procedure, 52

Colorado Rules of Civil Procedure, 59(b)

Colorado Rules of Civil Procedure, 107

COLORADO CONSTITUTION:

Colorado Constitution, Article II, Section 8

Colorado Constitution, Article II, Section 25

Colorado Constitution, Article V, Section I

Colorado Constitution, Article III.

LEGISLATIVE ACTS CITED:

Colorado Legislative Session Laws 1967

Colorado Legislative Session Laws 1976

MISCELLANEOUS:

Colorado Code of Judicial Conduct, Cannon I and II

COLORADO REGULATIONS:

Minimum Rules and Regulations for Child Care Centers, issued by the Colorado Department of Social Services.

Am. Jur. 2d Cited:

59 Am Jur 2d, Paragraph 17

CASES CITED:

Anderson v. Norfolk & Western Railway,
349 F. Supp. 121, (U.S.D.C., Western District Virginia 1972)

Austin v. The City and County of Denver
156 Colo. 180, 397 P.2d 743 (1964)

Brown v. Colorado (1882) 10
106 US 95, 1 S.Ct. 175

Central Land Co. v. Laidley (1895)
159 US 103, 16 S. Ct. 80

City and County of Denver v. Board of Adjustment
31 Colo. App. 324, 505 P.2d 44 (1972)

Colorado State Civil Service Employees Association v. Love
167 Colo. 436, 448 P. 2d 624 (1958)

Denver Milk Producers v. International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers Union.
116 Colo. 389, 183 P.2d 529 (1947)

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150 Colo. 136, 371 P.2d 271 (1962)

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Iowa v. Union Asphalt & Road Oils, Inc.
281 FSupp. 391, (D.C.Iowa, 1968)

Meyer v. State of Nebraska,
43 S.Ct. 625

Nye et al. v. United States, et al.
61 S.Ct. 810 (1941)

People ex Rel Tucker v. Rucker
5 Colo. 155 (1884)

Penfield Co. of California v. Securties Exchange Commission
67 S. Ct. 918

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary.
45 S.Ct. 571

Portland Gold Min. Co. vs. Duke
191 F 692, 113 C.C.A. 316

Ramey Construction Company, Inc. vs. The Apache Tribe of Mescolero Reservation, et al.
U. S. Court of Appeals, 10th Circuit Case # 78-1376, decision entered 3-4-80.

Smith v. Indiana (1903)
191 US 138, 24 S.Ct. 51, Braxton County Court v. West Virginia (1908) 208 US 192, 28 S.Ct. 275, Marshall v Dye (1913) 231 US 250, 34 S.Ct. 92.

Staley V. South Jersey Realty Co.
90 A. 1042, 1043, 83 N.J. Eq. 300, L.R.A. 1917B, 113 Ann. Cas. 1916 E 955; Fenton v. Walling, C.C.A. cal., 139 F 2d 608, 609.

Swann v. Zwahlen
131 Colo. 184, 280 P 2d 439 (1955)

Trail Ridge Ford, Inc. v. Colorado Dealer Licensing Board
190 Colo. 82, 543 P.2d 1245 (1975)

Uptime Corp. v. Colorado Research Corp.
161 Colo. 87, 420 P.2d 232 (1966)

U. S. v. Claflnn
97 U.S. 546, 24 L.Ed. 1082 (1878)

U. S. v. Jourden
193 F. 986 (9th Cir., 1912)

VanKleeh v. Ramer
62 Colo. 4, 156 P.1108 (1916)

Wyatt v. People
17 Colo. 252, 28 P. 961 (1892)

Wright v. People ex Rel. Sprague
31 Colo. 461, 73 P.869 (1903)

Yanow v. Weyerhaeuser Steamship Co.
274 F.2d 274 (1958)

APPEAL FROM THE SUPREME COURT OF COLORADO

JURISDICTIONAL STATEMENT

Appellant submits herewith his jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINION BELOW

OPINION: IN THE SUPREME COURT OF COLORADO, CASE NO. 80SA304, dated March 15, 1982. APENDIX A

PETITION FOR REHEARING: ENTERED IN THE SUPREME COURT OF COLORADO APRIL 28, 1982, Denied MAY 3, 1982. APENDIX B

TRIAL COURT OPINION: District Court of the City and County of Denver, State of Colorado, Case No. C-59260, Courtroom 14, Dated June 27, 1978 APENDIX C

GROUNDS OF JURISDICTION

The grounds for jurisdiction are set forth in 28 USC 1257 (2) which states:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows...."
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Further:

> .....In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." (Constitution of the United States, Article III, Section 2, Paragraph 2)

Case law supporting the appeal jurisdiction of the United States Supreme Court is as follows:

> "Supreme court's power to review state judgments is designed to restrain unconstitutional legislation not to correct errors."
> Central Land Co. v. Laidley (1895) 159 US 103, 16 S. Ct. 80.

> "those who seek to bring in review in Supreme Court judgment of state court must have personal, as distinguished from official, interest in relief sought and federal right alleged to be denied by judgment."
> Smith v. Indiana (1903) 191 US 138, 24 S. Ct. 51
> Braxton County Court v. West Virginia (1908) 208 US 192, 28 S.Ct. 275, Marshall v Dye (1913) 231 US 250, 34 S.Ct. 92.

> "To give Supreme Court jurisdiction it must in some way appear from return which is made to writ of error that the validity of treaty or statute of the United States or authority exercised under it has been drawn in question and decision is against their validy."
> Brown v. Colorado (1882) 106 US 95, 1 S.Ct. 175.

FIRST ISSUE

DOES THE "RULES AND "REGULATIONS" AUTHORIZED BY "COLORADO REVISED STATUTE" UNCONSTITUTIONALLY ALLOW THE COLORADO DEPARTMENT OF SOCIAL SERVICES TO:

A. EVALUATE THE EDUCATIONAL PROGRAM OF A PRIVATE SCHOOL TO OBTAIN A LICENSE TO OPERATE SAME?

B. ALLOWS THE INSPECTION OF RECORDS OF THE CHILDREN TO OBTAIN A LICENSE TO OPERATE SCHOOL WITHOUT THE CONSENT OF THE PARENTS OR A COURT ORDER?

ARGUMENT

The Plaintiff-Appellant presents these arguments for consideration to the Supreme Court of United States, although these issues were not presented to the Supreme Court of Colorado. However, these are the two constitutional issues that were the initial issues for which the Plaintiff-Appellant sought judicial review. These issues were not presented to the Supreme Court of Colorado on the advise of Counsel, because of the posture of the case. In the interests of justice a decision is now sought by the United States Supreme Court.

In accordance with the requirements of the "Child Care Act", 26-6-101 through 26-6-112, Colorado Revised Statutes 1973, the Colorado Department of Social Services has issued "minimum Rules and Regulations for Child Care Centers". Section A-7616 states:

> "The center shall carry out a planned, written program suitable to the needs of the children. This program shall be available for evaluation when requested by the State Department." (Emphasis added)

This evaluation is not only a violation of the Constitution of the United States of America, Amendments One and Fourteen but also violates the laws of God, The Holy Bible states:

> "Children, obey your parents in the Lord: for this is right.
> Honour thy father and mother; which is the first commandment with promise;
> That it may be well with thee, and thou mayest live long on the earth."
> EPHESIANS, 6, Verses 1, 2 and 3

"Children, obey your parents in all things: for this is well pleasing unto the Lord."
COLOSSIANS, 3, Verse 20

There are no directives that children must obey or be regulated by the State, therefore, this is a violation of the natural laws of God. Parents are the guardians of education to children and the State is in violation of the Constitution of the United States, Amendment One, which denies the regulation of any religious principle.

Further, regulation of an educational program in either public or private schools is a violation of the due process clause of the Fourteenth Amendment.

"The right to acquire useful knowledge has been expressly included in the liberty which the due process clause of the Fourteenth Amendment protects against unreasonable impairment by a state."
MEYER v. STATE OF NEBRASKA, 43 S.Ct. 625

"A state may not, however, establish a state monopoly of education by requiring all children to attend public schools and thus prohibiting their parents or guardians from providing for their education by private instruction or in private or parochial schools,..."
PIERCE v. SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY, 45 S.Ct. 571

"The right and duty of protection is not limited to preventing attacks by others. It requires that parents shall protect their children from the consequenses of their own weakness and ignorance. And parents, so long as they properly perform their duties, have a right to select the persons with whom their child will associate. This is an inseparable and inalienable ingredient of the parent's right to custody and control of a minor child and the court has no authority to interfere unless it first appears that the parent has forfeited his rights in a manner recognized by law."
59 Am Jur 2d, Paragraph 17

Regulation of an educational program for children under the age of six years is ridiculous where no state law requires such education. However, the regulation of an educational program in a private school is to "create a monopoly" by the state in violation of the due process clause of the fourteenth Amendment of the Constitution of the United States.

Inspection of children's records for the purpose of licensing, without the consent of the parents or a court order, is a violation of the Constitution of the United States of America, Amendments Four and Fourteen. Privacy of childrens records in public schools is further guaranteed by 20 U.S.C. 1232g, which states:

> "No funds shall be made available under any applicable program to any education agency or institution which has a policy or practice of permitting the release of education record (or personally identifiable information contained therein other than directory information, as define in paragraph (5) of sub-section (a) of this section) of students without the written consent of their parents to any individual, agency, or organization,....."
> 20 U.S.C. 1232 (b) (1)

For Congress to expressly protect the right of privacy for children of public schools and ignore the rights of children in private schools to the same privacy is discrimatory and violates the due process clause of the Constitution of the United States, Amendment Fourteen.

SECOND ISSUE

THE CHILD CARE ACT, 1973 COLORADO REVISED STATUTES, 26-6-101 ET SEQ., WAS IMPROPERLY ENACTED AND IS THUS VOID.

ARGUMENT

The Constitution of the State of Colorado is a limitation on the powers of the legislature, People ex Rel. Tucker v. Rucker, 5 Colorado 155 (1884). Thus, the power of the legislature extends only so far as it does not exceed the limitations imposed by the Constitution. Denver Milk Producers v. International Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers Union, 116 Colo. 389, 183 P. 2d 529 (1947), (appeal dismissed 334 U.S. 809, 68 S.Ct., 93 L.Ed. 1741). Colorado State Civil Service Employees Association v. Love, 448 P.2d 624, 167 Colo. 436 (1958); and the legislature may enact such legislation as it sees fit, so long as it is subject to the powers reserved to the people.

One such reserved power or limitation is the referendum power set out in Article V, Sec. 1 of the Colorado Constitution which establishes the legislative power but reserves to the people the right to referendum:

> The legislative power of the State shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly, and also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the general assembly.
>
> ....the second power hereby reserved is the referendum and it may be ordered,...against any act, section or part of any act of the general assembly, either by a petition signed by five percent of the legal voters or by the general assembly.
>
> The veto power of the Governor shall not extend to measures initiated by, or referred to the people. All elections on measures referred to the people of the State shall be held at the biennial regular general election, and all such measures shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon, and not otherwise, and shall take effect from and after the date of the

official declaration thereon by proclamation of the Governor, but not later than 30 days after the vote has been canvassed.
(Constitution of Colorado, Article V. Section 1).

An exception to the referendum power exists for "laws necessary for the immediate preservation of the public, peace, health, or safety....." (Colorado Constitution, Article V, Section 1). A recital of the above language, generally known as a "safety clause" is contained in virtually every act passed by the Colorado legislature. e.g., see, Session Laws of Colorado, 1967. The existence of such "safety clauses" render the acts which they contain immune to referendum by virtue of the provisions of the section.

While it has been held that the declarations contained in a safety clause are conclusive and not subject to review, Van Kleek v. Ramer, 62 Colo. 4, 156 P. 1108 (1916), such a construction, in light of indiscriminate use of the safety clause by the legislature, is repugnant to the concept of constitutional limitations of the Colorado Constitution, and is repugnant to the "Right to redress of Greivence" Amendment One of the Constitution of the United States, and Amendment 14, the right to due process and equal protection imposed on the State by the Constitution of the United States, since it enables the legislature to effectively repeal this portion of the Constitution of the State of Colorado.

The legislature itself implicitly recognized this potential for abuse when it conditioned the use of the safety clause by the legislative bodies of cities and towns by providing that any ordinance containing such a clause must "state in a separate section the reasons why it is thus necessary," and mus "(receive) the affirmative vote of three-quarters of all the members elected to each branch of such legislative body....." (1973 Colorado Revised statutes. 1-40-115 (1)).

The Child Care Act was passed with a "safety clause" included, as was virtually all other legislation enacted by the general assembly in that session. (For example, the legislative session of 1976 passed 173

bills and 7 bills in its extraordinary session and all contained the "Safety Clause"). While none can doubt that the activities of the legislature are freighted with cosmic significance, it strains the bounds of credulity to propose that virtually all of its acts are "necessary for the immediate preservation of the public peace, health, or safety" to the extent that the people's right to referendum must be extinguished.

The legislature having failed to exercise restraint in its use of the safety clause, it must be assumed that its utilization is designed to deprive the people of their fundamental rights. Such laws must of necessity be void or, at least, voidable, when challenged by those whom they affect.

> "Whether a purported public statute became a law in the manner prescribed by the Constitution of the State is a judicial question, to be determined by the court, and arises whenever the act is drawn in question, whether made an issue by pleading or not."
> Portland Gold Min. Co. v. Duke, 191 F 692, 113 C.C.A. 316

The Child Care Act is such a law; and cannot operate to curtail the rights or freedom of this Plaintiff-Appellant. Accordingly, the Plaintiff-Appellant cannot be in contempt for violating an injunction entered to enforce the provisions of this act.

The Colorado Supreme Court in its opinion rejected this argument of the Plaintiff-Appellant on the basis that the Court has long upheld the legislative enactment under this emergency measure as being conclusive and not subject to review. They declined to depart from clear precedent at this juncture based on a 1916 case which the Plaintiff-Appellant used to show that this was in fact the position of the Supreme Court of the State of Colorado. However, it is time for the Supreme Court of Colorado to review this precedent in light of current legislative position namely that of 1976 where the clear abuse by the legislature is evident in that every bill of the legislature carried the safety clause. A denial or due process and equal protection of the law under the Fourteenth Amendment of the United States Constitution.

The Colorado Supreme Court further upheld the legislative act by a footnote stating that the right to initiative can be used as a deterant to those citizens who oppose an enacted law from pursing the constitutional right. Under the Constitution of the State of Colorado the initiative is for the purpose of initiating legislation and not for the purpose of detering it, therefore, the Court cannot justify the revoking of fundamental rights simply because some other fundamental right still exsists, the requirements for initiative are far more substantial than those for referendum.This is like saying that it is alright to lose one leg because you still have another.

THIRD ISSUE

THE CONTEMPT PROCEEDINGS WERE INVALID BECAUSE BASED UPON IMPROPERLY OBTAINED EVIDENCE, AND CONDUCTED IN VIOLATION OF THE PLAINTIFF-APPELLANT'S CONSTITUTUIONAL RIGHTS.

ARGUMENTS

The contempt proceedings were ruled to be valid despite the fact that they were based on evidence illegally obtained from the Plaintiff-Appellant. The court's file should reflect the issuance and return of a search warrant for Plaintiff-Appellant's property. The search warrant state on its face that it was issued on grounds set forth in Rule 41, Colorado Rules of Criminal Procedure, and further states that any evidence found will be used in a subsequent criminal prosecution. The state utilized this wrongfully procured warrant to obtain the contempt citation evidence, and further abused proceedures by obtaining the search warrant from Jefferson County when the current case was pending in Denver County. This wrongfully procured evidence cannot be used in the contempt citation proceedings whether those proceedings are deemed to be criminal or civil. In perhaps the most similar case found, Iowa v. Union Asphalt & Road Oils, Inc. 281 F. Supp. 391, (D.C. Iowa, 1968), records were seized by state officers under the pretext of operating under a consumer law. In the resulting antitrust suit which was nominated civil, the records were not admitted due to the illegal method by which they were obtained. In the present case the trial court admitted the evidence even though it was obtained by officers of the state, acting through the Department of Social Services who obtained the records by use of a criminal search warrant. Despite these criminal aspects of proceeding, the Plaintiff was denied her Constitutional Rights at the subsequent contempt hearing.

The law of Colorado recognizes two types of contempt: Civil and Criminal. The distinction was stated as follows by the Colorado

Supreme Court in Wyatt v. People, 17 Colo. 252, 28 P. 961 (1892):

> "Civil contempts" are those quasi contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the Court; while "criminal contempts" are all those acts in disrespect of the court or its process, or which obstruct the administration of justice or tend to bring the court in to disrepute. (28 P. at 963).

Where, as here, the alleged contempt arises from the violation of an injunction issued for the purpose of preventing public as opposed to private wrong, the proceeding is a criminal proceeding. Wright v. People ex Rel. Sprague, 73 P. 869, 31 Colo. 461 (1903). Thus, the Plaintiff should be entitled to the protections of criminal procedure guaranteed by the Constitution in answering such a charge.

The case of Austin v. The City & County of Denver, 156 Colo. 180, 397 P.2d 743 (1964) establishs that, while no fixed procedure exists in contempt cases, due process must be observed. Where the proceeding and the penalty are criminal in nature, due process must go beyond notice and an opportunity to be heard.

At the hearing on August 23, 1978 the Plaintiff-Appellant demanded and was denied a jury trial; to being enied counsel of her choice and she objected to denial of her rights under several sections of the United States and Colorado Constitutions. The Plaintiff-Appellant having been denied such rights, and the proceedings having been conducted as a civil proceeding under Rule 107, Colorado Rules of Civil Procedure, it is invalid, and the judgments of contempt against the Plaintiff-Appellant are void.

Finally, the Plaintiff-Appellant twice requested dismissal of the contempt proceeding on August 23, 1979 on the grounds that she had no intent to violate the Court order, believing that her Motion for Stay and Extension of Time for Filing Motion for New Trial, not having been ruled upon, operated to stay execution of the Order. These motions were denied.

However, where contempt is criminal, intent is a factor. District Attorney v. District Court, 150 Colo. 136, 371 P. 2d 271 (1962); Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972); accordingly the status of the pending motions should be regularized or dealt with in some fashion prior to the imposition of criminal penalties on the Plaintiff-Appellant and the Court should consider that the pendency of such motions negates an intent by the Plaintiff-Appellant to disregard the Court's proper orders.

The Colorado Supreme Court in its affirmation of the judgement rambled on about the Plaintiff-Appellant's right to appeal but never addressed the issue that the Motions before the court was never ruled on even after this long delay of time, and failed to take note of the fact that the Plaintiff-Appellant was acting pro-se at a time when the entire legal process was working against the Plaintiff-Apellant who has had no legal training and was unable to afford any professional help, after spending a considerable sum to date. The Plaintiff-Appellant reflects at this time that the two issues presented to secure Constitutional Rights, have been ignored by the Courts, and this entire case now rests on other violations of Constitutional Rights. One can only ask how did such a miscarrage of justice ever occur, it has been a night mare.

The Colorado Supreme Court has further upheld the procedure of Rule 107, of the Colorado Rules of Civil Procedure, authorizing Criminal prosecution, without the benefit of constitutional safeguards. The Plaintiff-Appellant cannot understand this in view of its own decision in Wyatt v. People, 17 Colo. 252, 28P. 961 (1892).

Let us look at the decisions of the United States Supreme Court:

> "A contempt is considered a "civil contempt" when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public."
> NYE et al. v. UNITED STATES et al., 61 S.Ct. 810 (1941)

Further:

"This act, like the act of disobedience in the Gompers case constituted conduct which would have sustained either civil or criminal penalty in appropriate proceedings. But the unequivocal ruling of that case was that criminal penalties cannot be applied in civil contempt proceedings" 221 U.S. at pages 444, 449, 451, 31 S.Ct. at pages 499, 501, 502, 55 L Ed. 797, 34 L.R. A. N. S. 874."
Penfield Co. of California v. Securities Exchange Commission, 67 S.Ct. 918

"Where an adjudication of contempt is embodied in a single order which contains an amixture of of criminal and civil elements, the criminal aspects of the order fixes its character for purposes of procedure on review."
Penfield Co. v. Securities and Exchange Commission, 330 US 585, 91 L ed 1117, 67 S. Ct. 918

"A civil contempt is not an offense against the dignity of the Court, but against the party in whose behalf the mandate of the court was issued, and a fine is imposed for his indemnity. But Criminal contempts are offenses or injuries offered to the court, and a fine or imprisonment is imposed upon the contemnor for the purpose of punishment."
Staley v. South Jersey Realty Co. 90 A 1042, 1043, , 83 N. J. Eq. 300, L.R.A. 1917E, 113 Ann. Cas. 1916 E 955; Fenton v. Walling, C.C.A. cal., 139 F 2d 608, 609.
(Emphasis added).

FOURTH ISSUE

THE ORDER OF JUNE 27, 1978 IS NOT IN COMPLIANCE WITH RULE 52, COLORADO RULES OF CIVIL PROCEDURE, IS VIOLATIVE OF THE STANDARDS OF JUDICIAL CONDUCT, AND OF THE CONSTITUTION OF THE STATE OF COLORADO, AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND IS THUS INVALID.

ARGUMENT

An inspection of the Order signed and entered by Judge Flowers on June 27, 1978 leaves no doubt that it is verbatim the order written by the Attorney General on behalf of the Defendant-Appellee. The physical appearance of the Order is identical of that of other documents submitted by the Attorney General; the document contains a certificate of mailing to Yvonne Cavanaugh's former attorney on June 2, 1979, the date when both counsel were to submit such orders; the only apparent additions to the Order are the signature of Judge Flowers and the date; and, finally, nothing was deleted from the Attorney General's order, neither was anything added to it and no orders exsist in the record for the slightest change, not even a comma was added or deleted.

The Supreme Court of Colorado does not approve of the uncritical adoption of findings prepared by litigants. Uptime Corp. v. Colorado Research Corp., 161 Colo. 87, 420 P.2d 232 (1966). It is small wonder that it does not. The authority of the Courts is the cement of our Republican Form of Government. Any practice which calls into question the independence and responsibility of the judiciary undermines the footing of justice upon which the structures of freedom stand. No clearer pronouncement of these principals exists than those contained in the Colorado Code of Judicial Conduct.

CANNON I

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this code should be construed and applied to further that objective. (Emphasis supplied.)

CANNON II

> A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. (emphasis supplied).

This case extended over some eight years from the events which marked its beginning, to the date of the alleged judgement. It occasioned the generation of countless pages of written legal argument and record, and required the expenditure of untold hours of time for legal research and analysis as well as court appearances for argument and hearings, all of which arguments, except for the final one-half day trial and the briefs following the trial, were presented to other than the judge which entered the judgment. That the Plaintiff-Appellant should object to a judgment entered in the exact words of her adversary under such circumstances is not surprising.

More importantly, however, in the instant case the Order submitted and adopted was written not by a private attorney representing a private litigant, but an agent of the executive branch of the government the Attorney General, who appeared as representative of another division of the executive branch of government, the State Department of Social Services. Thus the adoption of the Attorney General's order by the Court has the effect of delegating the judicial power to the executive a process anathema to the Colorado Constitution, and to the Republican form of government imposed by the Constitution of the United States on each and every State of the Union. The Colorado Constitution specifically requires the independance of the judiciary:

> "The powers of the government of this State are divided into three distinct departments, the legislative, executive and judicial: and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as this constitution expressly directed or permitted.
> Constitution of Colorado, Article III
> (emphasis added)

The Plaintiff-Appellant well notes that case law in Colorado including the Uptime case cited above, holds that, although adoption verbatim of findings and orders is not approved and such findings will receive more critical scrutiny, such findings, if otherwise sufficient, will be supported. Nevertheless, in a case such as this, where the disapproved practice of verbatim adoption of a proposed order is compounded by an impermissible delegation of power, the resulting order must be held null and void of effect.

Let us review a decision from the United States Court of Appeals for the Tenth Circuit:

> "Verbatim adoption of a party's proposed findings of fact and conclusions of law may be acceptable under some circumstances. "those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence." United States v. El Paso Natural Gas Co., 376 U.S. 651 656 (1964); Norris Industries, Inc. v. Tappan Co., 599 F.2d 908, 909-10 (9th Cir. 1979). However, "the mechanical adoption of a litigant's findings is an abandonment of the duty imposed on trial judges by Rule 52, F. R. Civ. P. because findings so made fail to 'reveal the discerning line for decision...'" G.M. Leasing Corp. v. United States, 514 F 2d 935, 940 cert. granted on other grounds 423 U.S. 1031 (1975) (quoting Kelson v. United States, 503 F 2d 1291, 1294-95 (10th Cir. 1974)."
> Ramey Construction Company, Inc. vs. The Apache Tribe of Mescalero Reservation, et al. United States Court of Appeals, tenth circuit, case 78-1376, decision entered March 4, 1980.

It is apparent from the Tenth Circuit Courts opinion went to great lengths in determining that the decision rendered in a similar manner as the one in the instant case before this court, to determine that the trial court was reversed.

In this instant case the Colorado Supreme Court failed and refused to rule on this issue, a denial of equal protection and due process of law.

FIFTH ISSUE

NO RULING HAVING BEEN MADE ON THE PLAINTIFF'S MOTION FOR EXTENSION OF TIME FOR FILING MOTION FOR NEW TRIAL, AND NO MOTION FOR NEW TRIAL HAVING BEEN FILED AND RULED UPON, NO FINAL ORDER HAS ENTERED.

ARGUMENT

It is apparent from the record of this case that the Plaintiff-Appellant has attempted to seek review of both the procedural propriety and the legal merit of the judgment of June 27, 1978. In terms of ordinary appellate review of the merits, the Plaintiff-Appellant, by her then attorney prepared a Motion for Extension of Time to File Motion for New Trial. It cannot be doubted that this motion was prepared and directed to the Court, since the Defendant-Appellee has acknowledged receiving a copy of the motion by filing an argument in opposition to it. It would make no sense for the Plaintiff-Appellant to serve a copy of the Motion upon the Defendant-Appellee but not file the document with the Court. Indeed, until just prior to the hearing of August 23, 1978 the Plaintiff-Appellant believed the motion pending in the Court.

Rule 59(b), Colorado Rules of Civil Procedure provides for extensions of time for filing of new trial motions. Granting or denying such motions is within the sound discretion of the trial court. City & County of Denver v. Board of Adjustment, 31 Colo. App. 324, 505 P 2d 44 (1972).

Further, under Rule 6(b) the Court may "at any time.... order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order." Thus, the Trial Court had in its power to grant the Plaintiff-Appellant's Motion for an Extension of Time for Filing Motion for New Trial, since that Motion was filed within the original period.

In light of the complexity and gravity of the instant case, and in considerqtion of the length of the judgement order, it is reasonable to assume that an extension of time for new trial motion would have been granted, and extended beyond the thirty days requested, if necessary. In any case, the Plaintiff-Appellant, having filed a Motion for Extension of Time, was entitled to assume that some ruling would be made thereon and that pending such a ruling her rights would be preserved. In this case, before it became known that the motion had not been received by the District Court and was thus not before the Court in a timely manner, the Plaintiff-Appellant had discharged her counsel and was proceeding pro se. Thus, at the time when the ramifications of the misfiled or lost motion became critical, and the passage of time began to affect the Plaintiff-Sppellant's ability to repair the damage the Plaintiff-Appellant was pro se and proceeding without counsel.

If the Motion for Extension of Time is not sufficient to preserve Plaintiff's rights to file the new trial motion and proceed with her appeal rights, the Court may treat the Motion for Extension of Time as being a defective motion for new trial which would toll the running of the time for appeal. Such a procedure was discussed with approval in Yanow v. Weyerhaeuser Steamship Co., 274 F. 2d 274 (1958), a case discussing the Federal Rule 59 which does not provide for any extension of time for filing new trial motions. Indeed, under the authorities discussed in that case, the petition under C.A.R. 21 filed in this case could be treated as a Motion for New Trial.

Under either procedure, the Judgment order of June 27, 1978 would not at this point be final, no new trial ruling having been made: the Judgment Order would be properly subject to the stay Judge Flowers declared himself inclined to order; the Plaintiff-Appellant's rights would be preserved; and the Plaintiff-Appellant would not be subject to contempt proceedings.

The principle distinction between Rule 59 under the Colorado Rules and Rule 59 under the Federal Rules is that under the Federal Rules a motion for new trial is not a prerequisite to appeal. However, new trial procedure does exist and a litigant can obtain a new trial upon motion properly made. When the motion is made under the Federal Rules, the effect is to toll the running of time for the filing of a notice of appeal. That is, even under the Federal Rules, once a person has filed a motion for new trial the due date of a notice of appeal is stayed pending resolution of the motion for new trial. Under the Federal Rules, however, no extension of time for filing the motion is provided. In the Yanow case cited, the litigant had moved for an extension of time within the ten day period provided by the Federal Rules and it had been granted. The motion for new trial was subsequently denied and litigant perfected his appeal within 30 days thereafter. The Appellee argued that the Notice of Appeal, having been delayed by the ruling on the Motion for New Trial, was not timely filed since the Notice of Appeal had been filed more than 30 days after judgment, and, due to the extension of time, the motion for new trial had been filed more than ten days after judgment. The United States Court of Appeals upheld the validity of the appeal on the basis that the motion for extension of time, if insufficient to properly extend the time for the filing of the motion for new trial itself, although a defective one. The reasoning of the Ninth Circuit is set forth at 274 F.2d 283 as follows:

> The rationale of the cases relating to informal or irregular appeals is that notwithstanding the papers filed were inaptly worded, or labeled, or even failed to use the word "appeal" or were filed in the wrong court, yet they sufficed to show the party intended to appeal. Similarly, the application for time in which to move for a new trial gave notice of Appellant's intent to so move, and was an initiation of efforts to that end.

A similar rationale shoud cover this case. It is apparent that the Plaintiff-Appellant at all time intended to seek review of the matters she considered erroneous and intended to obtain a regularization of the decison process in the case. The interests of justice are not served by applying a rigid formalism to the efforts of the Plaintiff-Appellant so as to prevent, on purely procedural gounds, the assertion by Plaintiff-Appellant of solemn and substantive issues. As was recently stated in Greensway Development Company et al. v. Academy Park Ltd., et al ____Colo.____, ____P.2d____, (Ct. App. No. 79CA0517; 9 Colorado Lawyer, 558 (1980):

> Lack of adherence to formalities which do not result in prejudice should not interfere with the determination of the issues on the merits. "...The rules indicate clearly a general policy to disregard narrow technicalities and to bring about the final determination of justiciable controversies without undue delay." (Citing Swann v. Zwahlen, 131 Colo. 184, 280 P. 2d 439 (1955))

The Colorado Supreme Court in a lengthy disortation denied this right of due process to the Plaintiff-Appellant.

Accordingly, the State has in this case of an alleged offense sought to proceed civilly rather than criminally and to impose sanctions without providing the required procedures of indictment or information. Where the State seeks to enforce a criminal statute it it cannot proceed by a civil action. U. S. v. Clafinn, 97 U.S. 546, 24 L.Ed. 1082 (1878); U.S. v. Jourden, 193 F. 986 (9th Cir., 1912); Anderson v. Norfolk & Western Railway, 349 F.Supp. 121, (U.S. D.C., Western District Virginia, 1972).

The reason for this rule is quite simple: it is a fundamental proposition of our legal system that no person shall be "deprived of life, liberty or property without due process of law" (United States Constitution, Amendment 5 & 14; Constitution of Colorado, Article II, Section 25). Where the citizen is proceeded against on account of a criminal act and his liberty is at stake, due process requires the most punctilious application of those protections deemed necessary to shield the individual from the overwhelming power of the state. For example, the right to be tried by a jury, the right to strict rules of evidence, and so on, as guaranteed in other articles and amendments to both the Constitution of the United States of America and the Constitution of the State of Colorado.

It cannot be disputed that the entirety of the proceedings against the Plaintiff-Appellant consists in the marshalling of the powers and resources of the State in order to deprive her of freedom and property. The loss of a business license is a loss of liberty, and is a quasi-criminal penalty. To compel the citizen to face such procedures bereft of the safeguard established by the Constitution is a fundamental violation of the most basic liberties guaranteed by the Constitution. Trail Ridge Ford, Inc. v Colorado Dealer Licensing Board, 190 Colo. 82, 543 P.2d 1245 (1975). Since the Rules of Civil Procedure do not provide for the implementation of such safeguards, the State cannot proceed civilly in a case such as this.

SIXTH ISSUE

THE PROCEEDINGS WHICH RESULTED IN THE ORDER OF JUNE 27, 1978 WERE CRIMINAL IN NATURE AND THE TRIAL COURT, AS A CIVIL COURT WAS WITHOUT JURISDICTION.

ARGUMENTS

As was set forth above, the Constitution of the State of Colorado is a limitation on the plenary powers of the legislature. All legislation must conform to the constraints imposed upon the authority of the legislature. One such constraint is containd in Article II, Section 8 of the Constitution of Colorado:

> Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. In all other cases, offenses shall be prosecuted criminally by indictment or information. (emphasis added)

Certainly the Child Care Act creates an "offense;" the misdemeanor of violating the provisions of the act. It creates criminal penalties: a fine (1973 Colorado Revised Statutes, 26-6-112) and liability for the issuance of an injunction restraining the fundamental freedom of operating a legitimate business. Such a restraint must be construed as a further penalty, since it results in a deprivation of freedom and the clear language of the statute states that the injunction shall be "in addition to" the fine imposed by Colorado Revised Statutes 26-6112. In this case, the denial of license and imposition of the injunction was sought by the Department of Social Services on account of the alleged operation of the TOT COLLEGE without a license, and in violation of Department Regulations enacted, allegedly, in accordance with the Child Care Act. Again, it must be noted that any violation of the Child Care Act is declared to be a misdemeanor.

Accordingly, the administrative hearing before the administrative hearing officer is a nullity inasmuch as the Administrative Procedure Act provides for the implementation of the Rules of Civil Procedure and the Plaintiff-Appellant is thus denied the full protections of the criminal procedure. The statutory provisions of the Administrative Procedures Act compel the Plaintiff or any citizen deprived of liberty and fundamental rights to proceed into court as Plaintiff in a civil procedure. They are deprived of the strict protections of the Criminal law. Such a procedure is a further violation of the Plaintiff's rights and is beyond the jurisdiction of the Court.

These issues on jurisdiction was presented to the trial court and again to the Colorado Supreme Court. These issues do properly raise ligitimate questions as to the jurisdiction of the Court in this instant case. Jurisdiction when questioned must be established by the Court, it can not be assumed by silent consent. To date the jurisdiction of the Court has not been established, therefore, it must be assumed that no jurisdiction exsists.

FACTS AND STATEMENT OF THE CASE

In May, 1970 the Appellant, Yvonne W. Cavanaugh, purchased a child care center and began doing business under the name of TOT COLLEGE Located at 280 South Depew Street, Lakewood, Colorado, 80226. The Appellant applied for and was issued a provisional child care license by the Appellee, The Colorado Department of Social Services.

During the course of inspections of the Appellants' business by the Appellee, the Appellee demanded an inspection of the personal records the center maintained on each of the children attending the center, they further demanded the educational program of the center for evaluation by the Appellee. Both of these functions are a part to the Rules and Regulations promulgated by the Colorado Revised Statutes, Title 26, known as the "Child Care Act".

The Appellant found these functions to be repugnant to what she believed were the "Constitutional Rights" of herself, the children of the center, and the parents of the children. The Appellant believed it to be a violation of the rights of children guaranteed by the "Fourth Amendment of the United States Constitution, to reveal these records without the knowledge and consent of the parents, and believed it to be a violation of the "First Amendment Rights" to allow evaluation of an educational program of a private school by the State of Colorado.

Therefore, the Appellant began seeking the advise of Legal Counsel and after many months of searching for what the Appellant believed to be the right Attorney to best represent the interests of the Appellant, her children at the Center and their parents the Appellant began asserting these "Constitutional Rights" in accordance with the advise of her Legal Counsel.

It was the advice of Legal Counsel that we would have to begin by denying the right of the Appellee, the Colorado Department of Social Services to inspect the Center and thus set up a controversy, which

would eventually lead to a hearing on the denial of a license to the Center, with a hearing officer of the Colorado Department of Social Services.

The Appellant would like to call the Court's attention to the fact that the Appellant has no controversy with the health and safety standards imposed by the State, and has always allowed inspections by the Colorado Department of Health and the Local Fire Departments. Both of these agencies have given the Center excellant reports over the years.

On April 24, 1973, the Appellant applied for a renewal of the license for the Tot College. Thereafter, representatives of the Appellee attempted to inspect the premises and records of the children who attended Tot College on various dates through June, 1975. The Appellant refused to allow these inspections.

On January 2, 1975, Appellee notified Appellant that it was the intention of the Appellee not to renew the license of the Tot College. On June 19, 1975, a hearing was conducted before hearing examiner Edward A. Turrou, State Department of Social Services, in accordance with Colorado Revised Statutes, 1973, 26-6-108 (3). It was later stipulated that the Department of Social Services failed to follow the procedures set forth in the Administrative Procedures Act, C.R.S. 1973, Title 24 in the denial of the license. The hearing officer refused to address the "Constitutional issues" raised by the Appellant and ruled only those issues otherwise before him.

The agency decision resulted in the Appellant's provisional child-care license being rescinded and a denial of her application for renewal of the license for operation of child-care center and kindergarten.

The Judicial Review was commenced in the fall of 1975 under the provisions of C.R.S. 1973, 26-6-101 et seq., as amended, due to the refusal of the Department of Social Services to review the Appellan's license to operate her child-care facility known as the Tot College. The Appellant also sought declaratory relief for the purpose of construing the Constitutionality of 1973, C.R.S. 26-6-101, et seq., and of certain rules and regulations of the Colorado Department of Social Services.

The case was prosecuted over a period in excess of three years before Judge Henry Santo of the Denver District Court, State of Colorado. During this period a multitude of motions and briefs were filed, and at least ten hearings were held on various matters. The Appellant won all ten hearings, in that the relief requested by Appellant was granted or/that requested by Appelllee was denied. A trial to the Court on the merits of the case was ultimately scheduled for January 18, 1978.

Just prior to the date set for the trial the case was transferred from Judge Santo to Judge Clifton Flowers of the Denver District Court, State of Colorado. At a hearing in December, 1977 prior to transfer of the case, Judge Santo ruled that "The Plaintiff has raised legitimate constitutional issues which will be heard by this court".

The matter was tried to Judge Flowers for one-half day on January 18, 1978. On May 11, 1978 Judge Flowers ordered counsel for both parties to file "a proposed form of judgment order on or before June 2, 1978". Counsel for both parties complied; counsel for the Appellant, Yvonne Cavanaugh, doing so without notifying her of the order, or of Counsel's compliance with the Order.

On June 27, 1978, Judge Flowers affixed his signature on the document entitled "Findings of Fact, Conclusions of Law,and Order" submitted by the office of the Attorney General as counsel for the Appellee. The Attorneys for both parties were advised that the Judge had "adopted, signed and entered" the document. The Judge did not make a single adjustment to the "Order". Further, the "Order" failed to address the "Constitutional" issues and denied Appellant any relief.

On July 7, 1978 the Appellant's then attorney prepared and mailed a "Motion for Extension of Time for Filing Motion for New Trial" and "Motion for Stay of Agency Action and For Stay of Judgement Pending Appeal" Although these motions never appeared in the Court docket, copies were received by the attorney for the Defendant-Appellee, who, on July 10, 1978, filed "Defendant's Objections to Plaintiff's Motion for Stay of Agency Action and/or Stay of Judgement Pending Appeal" and "Motion for extension of Time for Filing Motion For New Trial". To date these motions have not been ruled upon or dismissed, although Judge Flowers, during the Contempt proceeding of August 23, 1978, indicated that the stay, at least, would have been granted had it come before him. The Appellant was never given the opportunity to correct the record.

On July 25, 1978, Appellant's then attorney filed a "Notice of Appeal" advising that appeal of the Court's June 27, 1978 Order was to be made to the Colorado Supreme Court. On July 27, 1978, a Petition under Rule 21, C.A.R. directed toward the validity of the June 27, 1978 Order was filed by the Appellant's then attorney. On August 3, 1978, the Colorado Supreme Court denied the Petition.

On August 8, 1978, the Appellant, being unable to make financial arrangements for continued representation by her then attorney discharged him.

After the discharge of her attorney, the Appellant proceeded pro se in this and other actions in an effort to obtain lawful rights and to protect legitimate interests.

As part of this effort the Appellant has sought relief in the United States District Court for the District of Colorado, where she filed a Complaint alleging violation of her rights by Judge Flowers. The Complaint was dismissed by the United States District Court on grounds of judicial immunity. The Appellant has also filed a complaint with the Colorado Judicial Qualifications Committee on Judge Flowers, which declined to consider her complaint. As a result of those complaints, Judge Flowers disqualified himself from further consideration of this case, and the case was reassigned to Judge Fullerton of the Denver District Court, State of Colorado.

The Plaintiff-Appellant also sought relief from the Colorado Supreme Court on a "Writ of Prohibition" which was summarily denied without explaination. Then the Appellant sought relief from the United States Supreme Court, with a Petition for "Writ of Prohibition" where her Petition was summarily rejected because it was not in a printed format.

The Plaintiff-Appellant filed a "Motion to Withdraw Compaint on January 15, 1979, after studing the jurisdiction of the trial Court, and deciding that in fact the trial Court did not have jurisdiction to hear the action from its very inception. Judge Fullerton stated that he would give the motion careful consideration and then issued an "order" stating that he could find no case law federal or state to support the the "Motion" therefore he must deny it.

In the instant case, the Appellant attempted on her own to follow up on the "Notice of Appeal" filed on July 25, 1978. However, due to her understanding that the necessary documents would cost some

$ 3,000.00 for preparation and forwarding of the record to the Appellate Court, which sum of money the Appellant did not have, and due to her belief that full transcripts of all prior hearings were necessary and for which there was insufficient time to prepare, the matter was not perfected; but was dismissed by the Court of Appeals, State of Colorado on August 12, 1978.

The prosecution obtained a search warrant from the County Court in Jefferson County, State of Colorado on August 9, 1978. Recited in the warrant were that it was issued upon grounds set forth in Rule 41, Colorado Rules of Criminal Procedure and that such materials will be used as material evidence in a subsequent criminal prosecution. Such prosecution has never been sought, and no probable cause for a criminal prosecution was set forth in the search warrant.

The contempt proceedings against the Plaintiff-Appellant commenced on August 14, 1978 with the issuance of a show cause Order by Judge Flowers. A hearing was held on August 23, 1978 at which time Plaintiff-Appellant was found to be in violation of the June 27, 1978 Injunction in that she continued to operate Tot College without a license. She was sentenced to a fine of $ 300.00 and five days jail sentence. Judge Flowers characterized the proceeding as one of "Civil Contempt" to vindicate the "Dignity of the Court". However, the Judge did not execute the sentence.

On January 18, 1979, the stay, which was never granted, was vacated and on February 6, 1979 a new order to show cause was served on the Plaintiff-Appellant.

A hearing was held on February 15, 1979 before Judge Robert Fullerton, Denver District Court, State of Colorado, at which the sentence against the Plaintiff-Appellant was executed.

On March 20, 1979 the Department of Social Services again requested a contempt citation against the Plaintiff-Appellant, which resulted in an additional finding of contempt against the Plaintiff-Appellant, a civil contempt to vindicate the dignity of the court, and the imposition of a $ 1,000.00 fine. Execution was stayed for thirty (30)days, until April 30, 1979.

On April 25, 1979, the Plaintiff-Appellant obtained the services of new legal counsel, who appeared with her on April 30, 1979.

Thereafter, by Order dated December 18, 1979, Judge Robert Fullerton issued his "Order On Plaintiff's Motion in Response to Contempt Citation". It was there ordered that the legal issues raised by the Plaintiff-Appellant in the contempt proceeding were without merit and the prior finding of contempt stood as decreed along with the $ 1,000.00 fine previously imposed as punishment for said contempt. The Plaintiff-Appellant was further granted a period of thirty (30) days from the period of the Order to purge herself of the contempt by complying with the law.

Thereafter, on January 16, 1980 the Petition for Rehearing was denied by Judge Fullerton and the Plaintiff-Appellant filed her "Notice of Appeal".

On April 7, 1980 the Plaintiff-Appellant docked her appeal in "THE COURT OF APPEALS OF THE STATE OF COLORADO", No. 80 CA 0101.

The Appeal was transfered to the Colorado Supreme Court "Upon request of the Colorado Court of Appeals" and on June 25, 1980 the Colorado Supreme Court accepted jurisdiction of the appeal. Case No 80 SA 304 was then assigned to the Appeal.

On November 19, 1980 oral argument was heard by the Colorado Supreme Court.

On March 15, 1982 a decision affirming the Judgement of the District Court of the City and County of Denver, State of Colorado was entered by the Colorado Supreme Court.

The Plaintiff-Appellant had entered into an agreement with her counsel that upon his request he would be allowed to withdraw as counsel for the Plaintiff-Appellant. This agreement was made because the Plaintiff-Appellant did not have funds available to pay fees as they accrued, and more than $ 5,000.00 remain unpaid today, therefore Counsel requested permission from the Plaintiff-Appellant to withdraw and Plaintiff-Appelant had no choice but to honor our original agreement. Therefore, on April 20, 1982 the Colorado Supreme Court granted withdrawal of Counsel. The Plaintiff-Appellant has had to proceed in her own defense from that date.

On April 28, 1982 the Plaintiff-Appellant entered a "MOTION FOR RECONSIDERATION OF JUDGEMENT" with the Colorado Supreme Court. This motion was denied on May 3, 1982 by the Colorado Supreme Court.

On June 1, 1982 the Plaintiff-Appellant filed a "Notice of Appeal" with the Colorado Supreme Court.

FEDERAL QUESTIONS ARE SUBSTANTIAL

This instant case comes before this court on appeal from the Colorado Supreme Court. Throughout the arguments of the issues presented by the Plaintiff-Appellant federal questions on each and every issue have been properly introduced. These violations are substantial and consist of violations of the Republican Form of Government, the denial of first, fourth, fifth, ninth, and fourteenth Amendment rights of the Plaintiff-Appellant under the Constitution of the United States of America. The case clearly comes under the appellate jurisdiction of the United States Supreme Court, as stated in 28 USC 1257.

The questions presented in the issues are so substantial as to require plenary consideration, with briefs on the merits and oral arguments, for their resolution.

CONCLUSION

Appellant submits that this appeal brings before the Court substantial federal questions which require plenary consiceration, with briefs on the merits and oral argument, for their resolution.

In conclusion, it can be seen that the procedures and foundations of the Contempt Citation are fatally defective. The alleged violations of the Child Care Act cannot constitute contempt, because the act is void.

The Plaintiff-Appellant's rights under the Constitution of the State of Colorado and the United States of America were not observed in the proceedings of the trial court or in the contempt proceedings.

The Order of June 27, 1978 was an inproper Order and was not a final Order such that it could be enforced through the contempt power, and finally, the trial court as a civil court, was without jurisdiction.

WHEREFORE, Plaintiff-Appellant respectfully urges this Court to reverse finding of Contempt entered by the trial court, vacate the imposition of the fine and declare that the trial court was without jurisdiction.

Dated: September 20, 1982

Respectfully submitted,

Yvonne W. Cavanaugh

Yvonne W. Cavanaugh, Plaintiff-Appellant, without effective counsel.
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Phones: 303-232-4473 or
303-333-5027 or
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CERTIFICATE OF MAILING

I hereby certify that on the 20th day of September, 1982, I sent a true and correct copy of the above "jurisdictional statement" by placing sme in the United States Mail, proper postage prepaid, and addressed to the following:

Maurice Kanizer
Assistant Attorney General
Human Resources Section
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203

Yvonne W. Cavanaugh

IN THE SUPREME COURT OF COLORADO

NO. 80SA304

YVONNE CAVANAUGH, d/b/a THE TOT COLLEGE,	)	
Plaintiff-Appellant,	)	
vs.	)	MARCH 15, 1982
STATE OF COLORADO, DEPARTMENT OF SOCIAL SERVICES,	)	
Defendant-Appellee.	)	

Appeal from the District Court of the

City and County of Denver

Honorable Robert Fullerton, Judge

EN BANC

JUDGMENT AFFIRMED

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JUSTICE LEE delivered the opinion of the Court.

JUSTICE DUBOFSKY does not participate.

APENDIX
A

This is an appeal from an order of the district court holding the appellant, Yvonne Cavanaugh, in contempt of court. We affirm.

The appellant was the plaintiff in the lower court seeking review under section 24-4-106, C.R.S. 1973, of an administrative decision to revoke her license to operate a day-care center for children. Appellant had been the owner and operator of The Tot College in Lakewood, Colorado since 1970. The operation of child care centers is regulated by Section 26-6-101, et seq., C.R.S. 1973, which requires licensing from the Colorado State Department of Social Services (Department) in order to maintain certain minimum standards for child care services. Appellant was granted a six-month provisional license to operate her day-care center in April of 1972. Before the license expired, a caseworker for the Department visited The Tot College and prepared a report detailing violations of the regulations found to exist at the child care facilities. A letter summarizing that report was sent to appellant on November 1, 1972, notifying her of the alleged deficiencies and requesting a written response detailing how she planned to correct the violations and comply with the regulations. Appellant did not respond as requested. Later, several attempts were made by the employees of the Department of Social Services to enter and inspect The Tot College. Each time the appellant or her staff refused to permit inspection. Section 26-6-107, C.R.S. 1973, authorizes the Department to make such inspections.[1]

/1 The Department asserted that its employees had attempted to inspect The Tot College on December 4, 1973, December 5, 1973, April 8, 1974, May 17, 1974, May 24, 1974, September 27, 1974, and January 20, 1975, but no inspection was allowed.

Appellant was several times warned that her license to operate the child care center would not be renewed if she persisted in refusing to allow an inspection.[2] Finally, an administrative hearing was held on June 15, 1975, in accordance with section 26-6-108(3), C.R.S. 1973, and section 24-4-105, C.R.S. 1973, et seq. Appellant raised several constitutional issues disputing the department's authority to make inspections of her business. The hearing officer did not consider constitutional arguments, but he determined that the refusal to allow inspection was a sufficient basis upon which to rescind the provisional license and to deny the application for renewal of the license. See Section 26-6-108(2)(g), C.R.S. 1973.

Appellant then sought judicial review of the administrative decision under section 24-4-106, C.R.S. 1973, due to the Department's refusal to renew her license to operate The Tot College. She asked for declaratory relief concerning the constitutionality of section 26-6-101, et seq., C.R.S. 1973, and of certain rules and regulations of the Department of Social Services promulgated pursuant to Section 26-6-106, C.R.S. 1973. Trial was had in January of 1978, and the court entered its final order in accord with the proposed findings submitted by counsel for the Department on June 27, 1978, and affirmed the agency action. The court upheld the constitutionality of the statute and the rules and regulations of the Department and enjoined the appellant from further operation of The Tot College without first obtaining a valid license. See, section 26-6-111, C.R.S. 1973.

/2 The Department sent letters addressed to Ms. Cavanaugh on December 18, 1973, May 6, 1974, and April 2, 1975, advising her of the authority to inspect and of the action which would be taken against her if she refused to comply.

fine and imprisonment sentence were executed against her. She duly served her sentence and paid her fine.

Appellant, though unlicensed, persisted in operating the day-care facility and on March 31, 1979 she was fined an additional $1,000 for contempt. The fine was stayed for 30 days and a hearing was scheduled. She obtained new counsel and a continuance was granted. A motion for correction of the record under C.R.C.P. 60(a) and for relief from judgment was filed. Briefs were submitted and arguments were had on the issues relating to the validity of the order of June 27, 1978 and the failure to effectively file a new trial motion. The district court declined to grant the relief requested. The court once again found the plaintiff to be in contempt but stayed its order for 30 days to allow the plaintiff to purge herself of contempt; failing to do so, the $1,000 fine would be imposed. It is from that order the appellant here seeks relief.

I.

The appellant questions the validity of the Child Care Act because she claims that it was improperly enacted. She refers to the fact that the bill was enacted as an emergency measure, and therefore it is not subject to public referendum.[5] She argues the law was not enacted for the stated reasons and was therefore void. She further contends that the district court was without power to hold her in contempt for violating an injunction entered to enforce the provisions of an invalidly enacted act.

/5 See, Colo. Const. art. V, sec. 1, where provision is made for the reservation to the people of the right of initiative and referendum, as well as the exemption from referendum for those "laws necessary for the immediate preservation of the public peace, health, or safety." Id.

Appellant's counsel then prepared a motion for stay of the judgment pending appeal and a motion requesting an extension of time in which to file a new trial motion. The motions, although served upon opposing counsel, were never filed with the court.[3] Appellate proceedings from the judgment were ineffectively pursued and eventually dismissed.[4] Appellant's counsel was discharged and appellant appeared pro se in subsequent proceedings except as hereinafter noted.

Soon after the judgment was entered, it was observed that The Tot College was still in operation. An investigator for the Department obtained a search warrant and accompanied police to The Tot College to determine if it was operating in violation of the injunction. Twenty-six children were observed on the premises. On August 23, 1978, the district court found the plaintiff in contempt for violating the injunction and ordered her to pay a $300 fine and to be imprisoned in the county jail for five days. She appeared pro se and a stay of execution of the contempt order pending appeal was granted on the condition that appellant refrain from violating the injunction. This appeal was dismissed by the court of appeals for failure to prosecute in December 1978. Because appellant continued to operate her child care facility, she was again found in contempt on February 15, 1979 and the previously ordered

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/3 The Attorney General, as counsel for the Department, on July 10, 1978, filed objections to appellant's motions for a stay and an extension of time in which to file a new trial motion. These, although noted in the court registry, do not appear in the record. Since appellant's motions were not filed, the Department's objections were never called up for hearing.

/4 The record indicates that on July 25, 1978, a notice of appeal to the supreme court was filed, followed by a petition under C.A.R. 21 challenging the propriety of the judgment entered on June 27, 1978. The petition was denied. Relief in the nature of prohibition was also sought in the Supreme Court of the United States, but was denied for failure to comply with the rules of that court.

We reject the appellant's argument. This court has long held that declarations of purpose in a legislative enactment under this emergency measure exemption are conclusive and are not subject to judicial review. Van Kleek v. Ramer, 62 Colo. 4, 156 P. 1108 (1916). We decline to depart from clear precedent at this juncture. A statement of purpose in enacting legislation under this clause is a matter of legislative policy. Therefore, the act is not void because of the enactment procedure utilized.[6]

II.

Appellant's challenge to the contempt order of December 18, 1978, to which this appeal is directed, is based on a collateral attack on the judgment affirming the agency action entered on June 27, 1978. The appellant had 15 days in which to file a motion for a new trial. This was not done. Although motions requesting a stay and an extension of the time in which to file a new trial motion were prepared and served on opposing counsel, they were not filed with the court until the latter part of May 1979, then only as attachments to appellant's C.R.C.P. 60 motion. It is clear that the timely filing of a motion for a new trial is a jurisdictional prerequisite to appellate review. Rowe v. Watered Down Farms, 195 Colo. 152, 576 P.2d 172 (1978); Kopff v. Judd, 134 Colo. 330, 304 P.2d 623 (1956); Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949).

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Nevertheless, there is nothing to deter those citizens who oppose an enacted law from pursuing the constitutional right of initiative. Thus, although invoking the emergency language in the enactment precludes citizen referendum on the law, the initiative power is available to redress the concerns of the citizens of the state. See, e.g., McKee, et al. v. City of Louisville, et al., ___ Colo. ___, 616 P.2d 969 (1980).

The appellant argues that the failure to file the motion for new trial was a result of inadvertence and clerical error on the part of either her former counsel or the court clerk. Therefore, she argues, she should not be penalized for the failure to perfect an appeal of the June 27, 1978 judgment. Appellant does not direct us to any facts to support her assertion that the clerk of the court somehow failed to receive and file her motions. We can only conclude that the failure to comply with C.R.C.P. 59 was her counsel's sole responsibility and not that of the clerk of the court.[7]

Appellant's position is that the collateral attack on the judgment of June 27, 1978 is proper since the district court erred in not granting relief from the judgment under C.R.C.P. 60(a) and (b).

C.R.C.P. 60(a) allows correction of a clerical mistake by the clerk of the court at any time. Since appellant has not demonstrated a clerical mistake by the clerk and none appears in the record, this basis for relief is groundless. Unexcused attorney failure to diligently proceed on behalf of his client does not constitute clerical error justifying relief under this section. Hatcher v. Hatcher, 169 Colo. 174, 454 P.2d 812 (1969); see also, Link v. Wabash Railroad, 370 U.S. 626, 633, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (case dismissal for attorney's unexcused neglect does not unfairly penalize party employing that attorney).

/7 We note from the record appellant's declaration which appeared in a letter dated July 1, 1978 addressed to the Governor of Colorado, copies of which were sent to counsel for the Department and to the various news media throughout the State of Colorado, which stated: "I realize that I have a right of appeal to the Colorado Supreme Court. I will not give this mockery of justice any recognition by entering an appeal."

Likewise the claim for relief due to inadvertence under Rule 60(b)(1) must also fail. The rule clearly states that such claims must be raised "not more than six months after the judgment, order, or proceeding was entered or taken." The judgment was entered on June 27, 1978, approximately ten months before this issue was raised in appellant's C.R.C.P. 60 motion. Thus, relief under this section of the rule is also unavailable. Atlas Construction Co. v. District Ct., 197 Colo. 66, 589 P.2d 953 (1979), Love v. Rocky Mountain Kennel Club, 33 Colo.App. 4, 514 P.2d 336 (1973).

Rule 60 also contains a residuary clause which allows relief from judgment for "any other reason justifying relief from the operation of the judgment," in addition to those specifically enumerated in other subsections of the rule. C.R.C.P. 60(b)(5); Atlas Construction Co., supra; see also Fed.R.Civ.P. 60(b)(6), which corresponds exactly to the Colorado rule. However, even the expansive "any other reason" language has been narrowly interpreted so as to avoid undercutting the preferred rule of finality of judgments. Rule 60 is not a substitute for appeal, but instead is meant to provide relief in the interests of justice in extraordinary circumstances. See, e.g., Carrethers v. St. Louis-San Francisco R. Co., 264 F.Supp. 171 (W.D. Okla. 1967); 15 A.L.R. Fed. 193; Edwards v.Velvac, Inc., 19 F.R.D. 504 (E.D. Wis. 1956).

The failure to timely file an appeal has been held not to be a sufficient ground to justify extraordinary relief from judgment. Fackelman v. Bell, 564 F.2d 734 (5th Cir. 1977); Demers v. Brown, 343 F.2d 427 (1st Cir. 1965); Frank v. New Amsterdam Casualty Co., 27 F.R.D. 258 (E.D. Penn. 1961); See also, Rueckhaus v. Snow, 167 Colo. 51, 445 P.2d 577 (1968). Appellant's failure to perfect an appeal from the earlier proceeding does not present a sufficient factual basis

to warrant extraordinary relief. There is no indication that she or her attorney attempted either to verify that a motion to extend the time for filing post-trial motions had been submitted to the court for filing, or to secure a ruling on that motion before the time for filing new trial motions had run.

Moreover, the appellant acknowledges that shortly before the August 23, 1978 contempt hearing, she became aware that no motion for extension of time had actually been filed with the court after the judgment was entered. Since these claims could have been raised much earlier, appellant's own delay in raising these issues is not excused. See, Carrothers v. St. Louis-San Francisco R. Co., supra. Therefore, we affirm the district court's ruling denying relief from the judgment of June 27, 1978. That judgment became final after the period in which to perfect an appeal expired and all issues litigated and decided by the judgment are res judicata. See, Brennan v. Grover, 158 Colo. 66, 404 P.2d 544, cert denied, 383 U.S. 926, 86 S.Ct. 929, 15 L.Ed.2d 845 (1965); Hudson v. Western Oil Fields, Inc., 150 Colo. 456, 374 P.2d 403 (1962).

The only proceeding properly reviewable by this court is the order dated December 18, 1979, which found appellant in contempt for violating the injunction and continuing to operate her child care center. All other orders are final and unappealable at this late date.

III.

The appellant challenges the contempt proceedings arguing that they are criminal in nature rather than civil. She in effect asserts that since the proceedings are criminal she was entitled to a jury trial and to the other due process

rights accorded one charged by indictment or information with a criminal offense. This assertion flows from a misreading of Sections 26-6-111 and 112, C.R.S. 1973, which provide for the enforcement of the licensing provisions.[9] As we understand appellant's argument, she contends that the remedy of injunction as authorized by Section 26-6-111 and the penalty section under 26-6-112 are so interrelated that both sections are essentially criminal in nature. We are not persuaded by this argument. In our view, a separate civil remedy of injunction is provided by 26-6-111 independent of the criminal sanction provided by 26-6-112. This is the clear import of the language of section 112 which provides: "Such injunctive proceeding shall be in addition to and not in lieu of the penalty provided in 26-6-112." Thus, compliance with the licensing requirements may be compelled by either the civil remedy of injunction or a criminal action, or by both.

The court is specifically authorized by Section 26-6-111 to subject one who disobeys an injunctive order to contempt of court proceedings. Since the violation of the injunctive order here occurred out of the presence of the court,

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"26-6-111. Injunctive proceedings. The department, in the name of the people of the state of Colorado, through the attorney general of the state, may apply for an injunction in any court of competent jurisdiction to enjoin any person from operating any facility without a license which is required to be licensed under this article. If it is established that the defendant has been or is so operating such facility, the court shall enter a decree enjoining said defendant from further operating such facility unless and until he obtains a license therefor. In case of violation of any injunction issued under the provisions of this section, the court may summarily try and punish the offender for contempt of court. Such injunctive proceedings shall be in addition to and not in lieu of the penalty provided in section 26-6-112.

"26-6-112. Penalty. Any person violating any provision of this article or intentionally making any false statement or report to the department or to any agency delegated by the department to make an investigation or inspection under the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than three hundred dollars."

the procedural requirements of C.R.C.P. 107(c) control the contempt proceedings. The contemner must be given notice and an opportunity to be heard on the issues raised by the citation. Before punishment may be imposed, the court must hear the evidence and make findings of the facts constituting the contempt, including a finding that the contemner had the ability to perform the acts which are the subject of the contempt. C.R.C.P. 107(d); Wright v. District Court, 192 Colo. 553, 561 P.2d 15 (1977); Marshall v. Marshall, 191 Colo. 165, 551 P.2d 709 (1976). If the contempt consists of the failure to perform an act in the power of the person to perform, the court may imprison the person until the act is performed, as well as impose a fine and imprisonment to vindicate the dignity of the court. C.R.C.P. 107(d).

The record is clear that the appellant was accorded all of the due process protections required in a civil contempt proceeding. The record established that even though the appellant had previously been fined and imprisoned pursuant to prior contempt proceedings initiated after she had been found to be in violation of the district court's injunction, she defiantly continued to operate her child care facility.

A contempt citation was again issued and the appellant was again found to be in contempt on March 31, 1979, and a $1,000 fine was assessed. This fine was stayed for 30 days and appellant was encouraged to retain counsel for a further hearing on April 30, 1979. She retained counsel, a continuance was granted on her motion, and she was allowed to submit briefs fully setting out her position and legal argument. The hearing was held and the district court entered its order in December of 1979, finding the plaintiff in contempt of the injunction and fining her $1,000. The appellant was given 30 days in

which to "purge herself of contempt by complying with the law or closing her day-care center." Appellant instead appealed the order.

The court found that the appellant had continued to operate her day-care facility in direct violation of the court's order. The court noted the appellant's repeated statements that she had no intention to comply with laws authorizing licensing and inspection of child care centers in Colorado. The appellant asserted no reason why she would be unable to comply. Her disagreement with the legislative wisdom in regulating child care centers is not a sufficient basis upon which to invalidate the contempt proceedings. All procedural requisites were met and the contempt proceedings were properly conducted. The appellant has failed to establish any error requiring reversal of the judgment of contempt.

IV.

The other issues raised by the appellant concern the contempt proceedings of August 1978, the sufficiency of the search warrant utilized in an August 9, 1978 search of The Tot College, the validity of the court order entered at the conclusion of the trial,[10] and the nature of the proceedings instituted by the Department against the appellant. As we have

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Among other issues raised, the appellant argues that the order and injunction entered in June of 1978 were invalid because they were prepared from proposed findings of fact and conclusions of law tendered by the counsel for the appellee, State of Colorado. The trial judge had requested counsel for both sides to present proposed orders after the hearing was held. The judge considered both orders and adopted that submitted by the attorney general representing the defendant. There is no error in this procedure "if, after careful study, the trial judge concludes that the findings prepared by a party correctly state both the law and the facts..." Uptime Corporation v. Colorado Research Corporation, 161 Colo. 87, 420 P.2d 232 (1966). Appellant did not object to the entry of the order in this form, nor did she perfect an appeal from the order. Therefore, the issues raised are res judicata, and we will not review the sufficiency of the evidence to support those findings.

stated above, these matters are now res judicata and will not be reviewed here.

We affirm the judgment of the district court holding the appellant in contempt.

SUPREME COURT, STATE OF COLORADO
Case No. 80SA304
Appeal, District Court, City & County of Denver

YVONNE CAVANAUGH, d/b/a THE TOT COLLEGE,

Plaintiff-Appellant,

vs.

STATE OF COLORADO, DEPARTMENT OF SOCIAL SERVICES,

Defendant-Appellee.

ORDER

Upon consideration of the Motion for Reconsideration of Judgement filed by the Plaintiff-Appellant in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Motion for Reconsideration shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, MAY 3, 1982.
DUBOFSKY, J. does not participate.

cc: Yvonne Cavanaugh
290 S. Depew Street
Lakewood, CO 80226

Maurice Knaizer, Asst. A.G.
1525 Sherman Street, 3rd Floor
Denver, CO 80203

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

MAY 3 1982

DAVID W. BREZINA
Court Clerk of the Supreme Court
Seal By Linda Garcia
Deputy Clerk

Notice filed in June 2, 1982

APENDIX
B

IN THE SUPREME COURT OF COLORADO

NO. 80SA304

YVONNE CAVANAUGH, d/b/a/ THE TOT COLLEGE,	)	
Plaintiff-Appellant,	)	MOTION FOR
vs	)	RECONSIDERATION
STATE OF COLORADO, DEPARTMENT OF SOCIAL SERVICES,	)	OF JUDGEMENT
Defendant-Appellee.	)	

COMES NOW the plaintiff-appellant without effective counsel or an attorney, before this court, and requests the court to reconsider their final judgement and opinion in the above entitled matter, handed down March 15, 1982.

As grounds for such reconsideration the plaintiff-appellant states the following:

I

This honorable court is to serve the interests of justice, that all people and causes before it have a fair and just decision, unencumbered by formality and precedent.

The plaintiff-appellant asks this court to reconsider its position on its inability to consider any question raised on appeal, except the contempt decision of December 18, 1979. Plaintiff-appellant hired a 'qualified' attorney who is an officer of this court and admitted to practice by the authority of this court. Yet when the "court officer" attorney failed, if indeed he did, to file a motion for extension of time in which to file a new trial motion, it is not this court nor its officer who is penalized, but the plaintiff-appellant who hired this duly authorized member of the bar, and officer of this court.

It is the duty of this court to rid itself of those who are incompetent and unable to fulfill their duties as officers of the court. It is not the responsibility of their clients to ride "shotgun" over them to be sure the work is done properly and timely. Most clients including the plaintiff-appellant are not properly educated to do such a task, and should not have to.

If the plaintiff-appellant had hired counsel "off the streets" with no bar membership and who was not an officer of this court, then the old adage of 'let the buyer beware' would be in full force and this court would have every right to deny hearing anything not properly or timely filed. But in this instant case, a "qualified licensed attorney and officer of this court was hired and utilized and therefore it behooves this court to accept some portion of the responsibility for the actions or inaction of said attorney, at least to the point of serving justice and considering all the issues raised in the appeal.

The court should also take notice and be aware that anyone can obtain the courts file on any matter, by checking it out from the clerks office. They may then, while looking it over or making copies, remove unwanted documents from the file. This is a very simple matter as anyone who has used the courts 'check out' system can relate. Said documents could have even been taken by the defendants in this matter, to derail continued hearings and review of their questionable actions.

Plaintiff-appellant does not state this as an accusation, only a possibility and because of the various possibilities that do exist and the courts interest and duty in serving the ends of jsutice, it should review all imues presented on appeal.

This court states (pg. 9, ¶1 of opinion) that the plaintiff-appellant nor her attorney attempted to secure a ruling from the district court before the time for filing a new trial motion has expired.

Having yourselves at some juncture been attornies, the appellant is confident that such "seeking of a ruling" is rare, as the attorney never wishes to upset the court because it could prejudice the matter before it, or some future matter. This court is being unrealistic in even stating such inaction is to be an excuse for denying review of the matters which must be reviewed to serve justice.

The plaintiff-appellant would ask the court to use its power and obtain the records of judge Fullertons court to check how tardy that courts rulings on motions were or are. They might find another reason that such ruling was not asked for.

Therefore the plaintiff-appellant asks the court to reconsider its statement on page 9 of its opinion that "All other orders are final and unappealable at this late date."

II

It is furthur the request of the plaintiff-appellant, that this court do its sworn duty to uphold the Constitution of Colorado in ALL its provisions, and not just those that fail to step on toes in the legislative or executive branches.

Specifically if this court does its duty, it will uphold the citizens right of referendum as required by the Colorado Constitution.

For this court to state that its alright to deny a constitutionally protected right of referendum because the citizens still have the right of initiative, is ludicrous, and would be the same as telling the plaintiff-appellant that she no longer has the right to vote, but she can still write letters to petition the legislature for changes in government.

Constitutional Rights may not be denied through the thinly veiled guise and trappings of the 'safety clause'. This clause was intended and enacted in our constitution for emergency use only, such as a disaster like the Big Thompson

flood; the Plum creek, Denver flood of the mid sixties; Epidemics; war; etc., not for feigned emergencies wherein the only thought is to keep your work from review by the soverign citizens who hired (elected) you, which is how it is now being used by the state legislature. Otherwise, it would not be on <u>every</u> legislative enactment coming from the legislature. It is sometimes termed expedient government, but then, so is a dictatorship.

Therefore, the plaintiff-appellant asks this court to review the abuse of the 'safety clause' as used in this case and as previously set forth before this court, and repeal the statutes which were used by the department of Social Services, to bring charges against the plaintiff-appellant. As it would serve the interest of justice, and restore the constitution to the people of Colorado.

III

The plaintiff-appellant furthur wishes this court to review the trial courts invoking 26-6-112. The trial court had no power or jurisdiction to envoke 26-6-112 as it was not requested by the defendant state agency, nor did the court have authority to rule on matters not before it as this court assumes they did in the matter of criminal contempt. The defendant only sought injunctive relief using rule 107 or 26-6-111.

While appellant agrees with the court that compliance <u>can</u> be compelled by <u>EITHER</u> the civil remedy of injunctive relief <u>OR</u> a criminal action, NO Criminal Action was initiated as would be required by the state or its agency and thus no authority to implement 26-6-112 was given the trial court.

<u>This Court has glossed over</u> the crucial issue of appellant not having been charged criminally by the state agency as it could have done, and then utilizing 26-6-112 on a misdemeanor action. Then and only then could the criminal contempt action be used and then, the appellant would be entitled to all her rights and a jury trial.

Instead, this court Must Reconsider its decision and reverse itself on the critical issue of the criminal sanction and penalty being used in a civil proceedings.

If the state is going to blend all actions at the whim of the individual courts we would have chaos in the courts and tyranny from them.

IV

Finally this court seems to state that as long as the appellant didn't object to each attorney submitting an order so that the trial court could see which one suited his fancy best, that such order was proper.

Such a conclusion smacks of this court approving the work of a judge to lazy to make his own independent decision. The judge is supposed to be impartial, but in matters where the State is concerned this impartiality seems non existant. Along with impartiality comes the judge being competent to make sound decisions on his own. In a case where the counsel are asked to write his decisions and he will pick the one that suits his fancy, such competency seems lacking.

If all courts come to the point of merely deciding which attorney writes the best opinion and prose ability means winning, then justice is forgotten and a talent contest in writing is set in motion. Perhaps a word processor and computer would be better. But in either event, justice would not be served, nor the case decided on its merits as they should be.

V

In conclusion, the Plaintiff-appellant requests this court to reconsider the issues herein presented.

Respectfully Submitted

Yvonne Cavanaugh

Yvonne Cavanaugh

280 So. Depew
Lakewood, Colorado

MAILING CERTIFICATE

I, the undersigned, hereby certify that on 28 day of April 1982, I sent a true and correct copy of the attached Motion for Reconsideration, by placing same in the United States Mail, proper postage prepaid, and addressed to the following:

Maurice Kanizer
Assistant Attorney General
Human Rescources Section
1525 Sherman St., 3rd Floor
Denver, Colordao 80203

E. L. Peuster

CT. RM. 14 JUN 27'78

IN THE DISTRICT COURT

IN AND FOR THE CITY AND COUNTY OF DENVER

AND STATE OF COLORADO

Civil Action No. C-59260, Courtroom 14

Filed in District Court
City & County of Denver, Colo.
JUN 27 1978

YVONNE CAVANAUGH d/b/a THE TOT COLLEGE,	
Plaintiff,	
v.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
STATE OF COLORADO, DEPARTMENT OF SOCIAL SERVICES,	
Defendant.	

This case is before the court on plaintiff's amended complaint seeking judicial review of a final action by the Colorado Department of Social Services (hereinafter the Department) pursuant to C.R.S. 1973, 24-4-4106, as amended, and declaratory and injunctive relief pursuant to Colo. R. Civ. P. 57 and 65.

In her action for judicial review, plaintiff seeks a reversal of the Department's action refusing to renew plaintiff's license to operate a child care center. The statutory authority for the Department to license the operation of child care facilities within the State of Colorado exists in the Colorado Child Care Act (hereinafter the Act) found at C.R.S. 1973, 26-6-101 et seq., as amended. Furthermore, pursuant to C.R.S. 1973, 26-6-106 of the Act, the Department has prescribed Minimum Rules and Regulations for Child Care Center, section A-7400 et seq., of the Department of Social Services Staff Manual (hereinafter Minimum Rules). The claim for judicial review stands submitted to the court on the record of the agency hearing and the briefs of counsel filed in accordance with C.R.S. 1973, 24-4-106(4), as amended.

Under Colo. R. Civ. P. 57 and 65 plaintiff, apart from the judicial review action, seeks a declaration that

APENDIX C

certain provisions of the Department's Minimum Rules are in excess of statutory authority, vague and unconstitutional and further that certain provisions of the Child Care Act itself violate plaintiff's rights to equal protection of the laws. This claim, after trial to the court on January 18, 1973, stands submitted to the court on the evidence and briefs filed by the parties.

At the time of the trial to the court both parties agreed to waive their right to oral argument.

FINDINGS OF FACT

Plaintiff, Yvonne Cavanaugh, is the operator and owner of the Tot College located at 280 South Depew, Denver, Colorado 80226. On April 18, 1972, as a result of an application for license filed by plaintiff, she was issued a provisional child care license by defendant. This provisional license was issued for a six month period beginning April 24, 1972, and expiring October 24, 1972. Defendant's reasons for issuance of the provisional license were stated on the face of the license, i.e., "To allow the caseworker time to observe the program and check records of children and staff." The license also provided that the licensed premises and the records thereof shall be open to inspection at all times to defendant or its authorized representatives.

On September 13, 1972, Sharon Guenther, a licensing caseworker of defendant visited the Tot College to conduct an inspection, but because plaintiff was ill on that date, the caseworker was requested to return at a later date. On October 5, 1972, the caseworker returned, completed the inspection, and discussed with plaintiff certain noted deficiencies.

By letter of November 1, 1972, plaintiff was further informed in writing of the deficiencies noted by the case-

worker during the October inspection. This letter requested that plaintiff respond in writing to defendant outlining how plaintiff intended to correct the deficiencies. The letter further advised plaintiff that the deficiencies must be promptly corrected to allow issuance of a license. No written response was ever provided by plaintiff.

On April 24, 1973, plaintiff signed a standard application form for renewal of the license for Tot College.

Following this, representatives of defendant attempted to inspect the premises and records of the Tot College on December 4, 1973, December 5, 1973, April 18, 1974, May 17, 1974, May 24, 1974, September 27, 1974, January 20, 1975, and June 15, 1975. These representatives were consistently denied permission to inspect the premises or its records, either by plaintiff or through her agents at the facility. This finding, by the hearings examiner, was based upon a stipulation, entered into between the parties at the agency hearing (agency hearing transcript, p. 23).

On May 6, 1974, and, again, on January 14, 1975, defendant sent letters to plaintiff noting that the Tot College had consistently denied defendant's representatives permission to inspect the premises on several prior occasions. The January letter further advised that if such inspection was again refused, defendant intended to take action to refuse to renew the license of Tot College, since, without inspection, defendant has no means of assuring itself that minimum standards for operation of such a facility were being met. Delivery of the January letter was refused by plaintiff, and the letter was returned by the Post Office Department to defendant.

On January 2, 1975, defendant by certified mail, notified plaintiff that as a result of plaintiff's refusal to permit inspections by defendant's representatives, defendant

proposed not to renew the license of the Tot College. On the bases of this letter, the hearings examiner found that plaintiff was provided with timely and adequate notice of a hearing scheduled to determine whether the license for that facility should be renewed. On June 19, 1975, such a hearing was held at which time plaintiff was present and was represented by Mr. Ralph M. Clark, Esq. and Mr. Edward M. Bendelow, Esq.

To this day, as a consequence of this court's order staying the agency action, the Tot College still operates under the same provisional license, issued in April, 1972, which has never been renewed or extended.

ISSUES OF LAW

As previously indicated, this case involves two primary and distinct causes of action. The first involves a judicial review pursuant to C.R.S. 1973, 24-4-106, as amended, of the Department's final agency action refusing to renew plaintiff's license to operate a child care center. The second seeks declaratory and injunctive relief pursuant to Colo. R. Civ. P. 57 and 65 concerning the validity of various provisions of the Child Care Act and the regulations promulgated thereunder. Each cause of action, as outlined in the several briefs filed by plaintiff, is supported by a number of distinct arguments.

With regard to plaintiff's action for judicial review, the court, having reviewed the briefs of counsel, determines that the appropriate issues for determination are as follows:

A. Was the refusal by plaintiff to permit representatives of the State Department of Social Services (SDSS) to physically inspect her facility a valid basis for the denial of plaintiff's application for a license to operate a child care facility?

B. Is the SDSS to be precluded from denying plaintiff's application for a license to operate a child care center as a consequence of its delay in processing such application?

C. Was plaintiff denied due process at the agency hearing by the unavailability of Sharon Guenther?

D. Was plaintiff entitled to be afforded the opportunity to submit written data, views, and arguments pursuant to C.R.S. 1973, 24-4-104(3) and, if so, was plaintiff afforded such an opportunity?

E. Were the inspections and attempted inspections by the Department of plaintiff's center conducted in a reasonable manner?

F. Are the remaining errors assigned in plaintiff's opening brief, errors at all, and, if so, are they harmless?

Having reviewed the pleadings and briefs of counsel regarding plaintiff's claims for injunctive and declaratory relief, the court determines the pertinent issues to be as follows:

A. Is section A-7416 of the Department's Minimum Rules and Regulations for Child Care Centers in excess of statutory authority, vague or unconstitutional?

B. Is section A-7412 of the Department's Minimum Rules and Regulations for Child Care Centers in excess of statutory authority or unconstitutional?

C. Does C.R.S. 1973, 26-6-102(1)(a), as amended, violate plaintiff's right to equal protection of the laws?

DISCUSSION AND CONCLUSIONS OF LAW

I.

Plaintiff's Action for Judicial Review

In considering plaintiff's action for judicial review the court is governed by the Administrative Procedure Act, C.R.S. 1973, 24-4-106(7) which provides as follows:

> If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law, then the court shall hold unlawful and set aside the agency action and shall restrain the enforcement of the order or rule under review, compel any agency action to be taken which has been unlawfully withheld or unduly delayed, remand the case for further proceedings, and afford such other relief as may be appropriate. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party. In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established.

The court is further guided in its review by the legal maxim of administrative law setting forth a strong presumption of the validity and regularity when administrative officials decide issues within the specific area of their authority and placing the burden of overcoming the presumption on those challenging the administrative decision. Crowther vs Seaborg, 312 F. Supp. 1205 (D.C. Colo. 1970); Moore vs District Court In and For the City and County of Denver, 184 Colo. 63, 518 P.2d 948 (1974). Plaintiff has failed to overcome this presumption.

At the outset, the court notes from the briefs the considerable controversy between the parties as to whether the final agency action of the Department regarding plaintiff's license was a refusal to renew plaintiff's license as plaintiff suggests, or a denial of an original license, as sug-

gested by the Department. The court concludes that such distinction has no effect on its determination. The Department prevails under either characterization of the agency action. For this reason and for the sake of judicial economy, the court's decision adopts the characterization offered by plaintiff and will assume the Department's final agency action to be a refusal to renew plaintiff's license to operate a child care center.

A. Was Plaintiff's Refusal to Permit Representatives of the Department to Physicall Inspect Her Facility a Valid Basis for the Refusal to Renew Plaintiff's Application for a License to Operate a Child Care Facility?

The sole basis for the Department's action refusing to renew plaintiff's license was plaintiff's refusal to permit inspection of her facility after the inspections of September and October, 1972. The court has found that these inspections revealed various deficiencies regarding plaintiff's facility which would not have permitted a renewal license to issue at that time. The Department, rather than taking agency action, attempting to accommodate plaintiff, delayed such action to permit plaintiff an opportunity to bring those deficient conditions into compliance.

However, on seven subsequent visits by the Department to plaintiff's facility, as stipulated to by the parties at the agency hearing, plaintiff "did refuse, (to) allow her school to be inspected by agents of the Department of Social Services" (agency transcript at 23).

The Child Care Act at C.R.S. 1973, 26-6-108(2) provides in part, that:

> The department may suspend, revoke, make probationary, or refuse to renew the license of any facility regulated and licensed under this article should the licensee:

> (g) Fail or refuse to submit to an investigation or inspection by the department or to admit authorized representatives of the department at any reasonable time for the purpose of investigation or inspection.

(emphasis added). The court concludes that based upon plaintiff's admitted refusal to permit inspection of her facility by representatives of the Department that the Department was justified in refusing to renew plaintiff's license.

> 2. Is the Department Precluded from Refusing to Renew Plaintiff's License as a Consequence of its Delay in Taking Such Action?

Plaintiff contends that after having permitted inspections of her facility in September and October of 1972, she was under no further obligation to allow subsequent inspections and that, on the basis of those inspections, the Department had the "duty ... to issue or deny a license ..." (plaintiff's opening brief, p. 12).

Having reviewed the Child Care Act, the court is unable to find any such duty owing plaintiff from the Department. C.R.S. 1973, 24-6-107(1) provides that:

> The department shall investigate and pass on each original application ... for a license, and when it is satisfied that the applicant ... is competent and will operate adequate facilities to care for children under the requirements of this article and that minimum standards are being met and will be complied with, it shall issue a license for which applied.

(emphasis added). On this basis, the court concludes that the Department is charged with no "duty" under the Child Care Act to either grant or deny an application on the basis of a specific, limited number of inspections. To the contrary, it permits action, approving a license, only after defendant is "satisfied" that a facility is qualified. In

reaching its decision regarding the qualifications of a facility to operate a child care center, the Department, through its hearing examiner, made the following comment on the importance of the inspection process:

> Physical inspection of the premises and the records of the facility provide the Department with the best means of assuring itself that deficiencies noted on prior inspections have been corrected, and that the facility in question is operating in accordance with such minimum standards. Where representatives of the SDSS are denied permission to make such physical inspections of the premises and its records, and such physical inspection is considered necessary by the Department, the purpose of the statute and its implementing regulations is thwarted and the SDSS cannot be assured that a license should properly be issued, or continued, for the facility in question.

(agency decision, pp. 6,7). The court concludes that the Department could approve plaintiff's renewal license only after "satisfying" itself that plaintiff had corrected the deficiencies found during the September/November 1972 inspections. Plaintiff, by refusing to allow the Department the best means of so satisfying itself that plaintiff was qualified, i.e., refusing to permit subsequent inspections, the Department had no alternative but to refuse to renew plaintiff's license.

Plaintiff alleges that the Department action should be reversed because it was not rendered in accordance with C.R.S. 1973, 24-4-104(8) of the Administrative Procedure Act which requires that "an application for a license shall be acted upon promptly." While plaintiff first refused to permit the Department to inspect her facility in December 1973, plaintiff was not given notice of the Department's proposed action not renew her license until January 1975.

The court finds this argument is without merit. The law in the State of Colorado is abundantly clear that a judg-

ment will not be reversed for alleged errors unless they are shown to be prejudicial to the substantive rights of the party claiming to be prejudicial to the substantive rights of the party claiming to be aggrieved thereby. Bigler vs. Richards, 151 Colo. 325, 377 P.2d 552 (1963); Madden vs. Gateway Cent. Pub. Co., 130 Colo. 73, 273 P.2d 733 (1954); Stahl vs. Cooper, 117 Colo. 468, 190 P.2d 891 (1948); Eichel vs. City and County of Denver, 106 Colo. 576, 108 P.2d 236 (1940); In re People in Interest of L.L.W., ___ Colo. App. ___, 513 P.2d 476 (1973). Furthermore, the burden rests upon the party asserting error to present a record which discloses prejudicial error, since a judgment is presumed correct unless the contrary affirmatively appears. Colo. vs. Kyle, 141 Colo. 492, 348 P.2d 960 (1960); Thompson vs. Davis, 117 Colo. 82, 184 P.2d 133 (1947); Hollenbeck & Reeves vs. Peterson, 115 Colo. 301, 172 P.2d 678 (1943).

While plaintiff claims that the delay in processing her application worked an "obvious prejudice" on her (plaintiff's opening brief, p. 6), the facts in this case wholly fail to support this contention. The hearings examiner specifically found no prejudice to plaintiff, in that, she was "permitted to continue her operations as a child care center under the provisional license previously issued" (agency decision, p. 10). In fact, plaintiff continues to operate her facility to this date.

The court further concludes that even assuming plaintiff was prejudiced by the Department's failure to act promptly on her license pursuant to C.R.S. 1973, 24-4-104(8) of the APA, plaintiff waived her right to prompt action by her inaction. C.R.S. 1973, 24-4-105(10) of the APA provides in pertinent part as follows:

> (U)pon application made to any court of competent jurisdiction by a ... person adversely affected by agency action and a showing to the court

> that there has been undue delay in connection with such ... action, the court may direct the agency to decide the matter promptly.

If plaintiff actually felt at any time between the filing of her application in 1972 until the scheduled hearing in 1975, that she was prejudiced by the delay, her remedy in this district court was clear. Plaintiff, having chosen to continue to operate her facility under the provisional license and not having previously petitioned this court to direct defendant to decide on her application, has waived her right under C.R.S. 1973, 24-4-104(8). Kelley v. Silver State Savings and Loan Association, ___ Colo. ___, 534 P.2d 326 (1975).

Finally, the court finds that what plaintiff is really arguing regarding the promptness of the agency action is a question of estoppel, i.e., because of the Department's excessive delay in processing plaintiff's application, the Department is estopped from refusing to renew plaintiff's license.

At the outset the court notes that the essentials of estoppel would require a showing that plaintiff was misled by the Department's delay, that plaintiff's reliance on that delay was reasonable and that plaintiff was harmed thereby. Genua v. Kilmer, ___ Colo. App. ___, 546 P.2d 1279 (1976). The court's previous conclusions on harmless error and waiver preclude the application of estoppel against the Department.

Furthermore, as the Department is a governmental agency, plaintiff's estoppel argument is even less compelling. The Colorado Supreme Court has ruled that estoppel will only be applied against an entity of the State to prevent "manifest injustice." University of Colorado v. Silverman, ___ Colo. ___, 555 P.2d 1155 (1976). The court concludes that there is no evidence of such "manifest injustice."

Finally, with respect to the issue of delay, plaintiff cites C.R.S. 1973, 24-4-106(7) which provides that the district court on judicial review may "compel any agency action to be taken which has been ... unduly delayed." The court finds that this provision is not pertinent in the case where, as here, the agency has taken its agency action.

C. Was Plaintiff Denied Due Process at the Agency Hearing by the Unavailability of Sharon Guenther?

Plaintiff in her opening brief at pp. 12 and 13 argues that the absence of Sharon Guenther at the agency hearing constituted a denial of plaintiff's due process. Sharon Guenther was the licensing representative for the SDSS who performed the inspections of September and October, 1972, and who further, in her letter of November 1, 1972, notified plaintiff of the deficiencies found during her inspections. The November letter requested that plaintiff reply in writing to SDSS as to how plaintiff intended to correct the noted deficiencies. Plaintiff testified at the hearing that she had called Ms. Guenther after receiving the letter and informed her that the deficiencies had been corrected. Plaintiff now claims that without Ms. Guenther's presence at the hearing there was no way for plaintiff to prove her telephone call had actually occurred.

The court fails to see how whether or not this telephone call was made has any bearing on the correctness of the Department's action. Even if the court assumes plaintiff made such a telephone call, the fact that she subsequently refused inspections was sufficient grounds for the agency action.

Furthermore, the court finds that at no time during the agency hearing was this issue of Ms. Guenther's unavailability ever raised. The record is wholly void of any attempts

by plaintiff to compel the attendance of this witness or in any other way secure a statement from her. There is no indication plaintiff attempted to depose the witness, to subpoena the witness, or to request defendant make such witness available at the hearing. Moreover, plaintiff at no time requested the hearing be continued until Ms. Guenther could be present. The law in Colorado is clear: questions not presented at the trial level will not be considered on appeal. Quimby vs. Boyd, ? S. Ct. 147, 128 U.S. 488, 32 L. Ed. 502 (U.S. Colo. 18?8); U.S. vs. Imperdino, 534 F.2d 1378 (C.A. Colo. 1976); Cecic vs. Cecic, 164 Colo. 103, 432 P.2d 768 (1967).

The court concludes that even assuming the relevancy of Ms. Guenther's testimony, plaintiff's failure to raise this issue at the trial level precludes review in this court.

D. Was Plaintiff Unlawfully Denied Her Rights Under C.R.S. 1973, 24-4-104(3) to be Afforded the Opportunity to Submit Written Data, Views, and Arguments?

Plaintiff argues that defendant failed to comply with C.R.S. 1973, 24-4-104(3) of the APA, which provides that:

> No revocation, suspension, annulment, limitation, or modification of a license by an agency shall be lawful unless, before institution of agency proceedings therefor, the agency has given the licensee notice in writing of facts or conduct that may warrant such action, afforded the licensee opportunity to submit written data, views, and arguments with respect to such facts or conduct, and except in cases of deliberate and willful violation, given the licensee a reasonable opportunity to comply with all lawful requirements.

(emphasis added). Plaintiff contends that she was never afforded an opportunity to submit written data, views, and arguments.

The court notes that the Department specifically found that plaintiff had been afforded opportunity to submit writ-

ten data, views and arguments with respect to the facts and conduct defendant relied upon in denying plaintiff's application.

> It is considered that the certified letter of January 10, 1975, delivery of which was refused by the (plaintiff), adequately advised the (plaintiff) of the facts and conduct complained of which might result in a refusal to renew (plaintiff's) license to operate Tot College, and fairly appraised her of action which she could take to avoid such a result, i.e., authorize representatives of the Department to inspect her facility to insure that there has been compliance with the rules and regulations governing operation of child care centers. A similar opportunity was afforded on May 6, 1974.

(agency decision, p. 13). The court concludes that competent evidence supports the Department's finding that plaintiff was given such an opportunity, and therefor the court will not disturb that finding on appeal. Answerphones Inc. vs Public Utilities Commission, 185 Colo. 175, 522 P.2d 1229 (1974).

The court further concludes that on the basis of two recent court decisions, plaintiff was not entitled to protection under C.R.S. 1973, 24-4-104(3). Fink vs. State Board of Pharmacy, ___ Colo. App. ___, 515 P.2d 477 (1973 and Dixon vs. State Board of Optometric Examiners, ___ Colo. App. ___, 565 P.2d (1977). The Fink decision was a judicial review of an action by the State Board of Pharmacy suspending the pharmacist's license of Seymour Fink. The trial court set aside the agency action on the ground that the agency did not afford Fink an opportunity to submit written data, views and arguments prior to institution of the agency proceedings. The court of appeals reversed the trial court and reinstated the agency action, stating:

> First, assuming arguendo that before July 1, 1969, the notice procedures set out in the Administrative Code were applicable to the Pharmacy Board,

> the Board could, nevertheless, institute proceedings without complying with the provisions of (C.R.S. 1973, 24-4-104(3)), where the Board had reasonable grounds to believe that the licensee had deliberately and willfully violated the law, and where such finding was made and incorporated in the resulting order.

Eick, supra, 515 P.2d 479. At page 13 of the agency decision the hearings examiner expressly found that plaintiff "deliberately and willfully" violated the Child Care Act by denying permission for the representatives of the SDSS to inspect Tot College on several occasions between December, 1973, and prior to January 10, 1975, as well as in June, 1975." Again, the court concludes that based on the stipulation between the parties at the agency hearing that plaintiff refused inspection (agency tr. 23), the agency's finding that plaintiff deliberately and willfully violated the Act is supported by competent evidence and will not be disturbed on appeal. Answerphone, Inc. vs. Public Utilities Commission, supra. Hence, on the basis of the Eick decision, plaintiff was not entitled to an opportunity to submit written data, views and arguments.

Furthermore, in Dixon vs. State Board of Optometric Examiners, supra, the court noted that there is no requirement that a licensee be given two notices, one prior to institution of proceedings and, then, a second notice instituting proceedings. The court there found that:

> The notice of hearing served the dual purpose of informing Dixon of the hearing date and giving him a written notice of the facts or conduct warranting the board's action, as well as telling him of his "opportunity to submit written data, views, and arguments with respect to such facts or conduct." In addition to detailing these specific charges, including the underlying factual basis thereof, the notice also told Dixon that he could appear with or without counsel, present evidence, produce witnesses, cross-examine witnesses, and having subpoenas issued. Thus the prerequisites of

the statutes were met.

Dixon, supra, at 962. The court finds that plaintiff on April 2, 1975, was duly notified of the agency hearing which was initially scheduled for April 28, 1975. This hearing was continued until June 19, 1975. On that date plaintiff, represented by co-counsel, Mr. Ralph M. Clark, Esq. and Mr. Edward M. Bendelow, Esq., was afforded full opportunity to present all data, views and arguments concerning the proposed action of defendant. On the basis of this finding the court again concludes the Department met its obligation under C.R.S. 1973, 24-4-104(3).

E. Were the Inspections and Attempted Inspections of Plaintiff's Facility by the Department Conducted in a Reasonable Manner?

Having reviewed the briefs on this issue, the court finds that the parties are in basic agreement that the Department is "held to a standard of 'reasonableness' in carrying out its licensing inspections." (plaintiff's reply brief, Re: Administrative Hearing at 7). This issue is further simplified by plaintiff's acknowledgement that "thus it amounts to a factual question as to whether defendant's inspections were reasonably conducted" (plaintiff's reply brief, p. 7). The court agrees with plaintiff's assessment that the question of reasonableness is a question of fact. In light of this, the court notes that at pp. 12 and 13 of the agency decision the hearing examiners found:

> There is no evidence to indicate that the inspections in question were not attempted at a "reasonable time." Additionally, had the respondent not refused the delivery of the certified letter mailed to her on January 14, 1975, she would have been given adequate notice in advance of the inspection that the inspectors were planning to visit her facility on January 20, 1975, and adequate arrangements could have been made for her to be present

even though the regulations do not so require. Additionally, she was fairly apprised of a pending inspection by the SDSS in a letter dated May 6, 1974, and, although she could have been present in person, refused to permit inspection.

The court, having reviewed the agency record and arguments of counsel, concludes that the inspections and attempted inspections by the Department of plaintiff's facility were on all occasions reasonably conducted or attempted.

F. Miscellaneous Assigned Errors.

Aside and beyond the issues addressed above, the court, upon review of plaintiff's opening brief, notes the existence of as many as eleven additional assignments of error. Each of these are independently considered in defendant's answer brief (pp. 18-21). The court is not persuaded by any of these arguments of plaintiff. As the Department properly suggested these assigned errors in general are either irrelevant to the issue of the correctness of the final agency action or the errors are harmless to plaintiff.

II.

DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO COLO. R. Civ. P. 57 AND 65.

In addition to her request for judicial review of the Department's agency decision pursuant to C.R.S. 1973, 24-4-106, as amended, plaintiff also seeks declaratory and injunctive relief pursuant to Colo. R. Civ. P. 57 and 65. While the court's judicial review of the agency decision was on the record of the agency hearing, plaintiff's claims under Colo. R. Civ. P. 57 and 65 were tried de novo to this court on January 18, 1978. The court notes that the de novo trial was quite unproductive in bringing before this court any additional evidence in support of plaintiff's claims. The

court further notes that plaintiff's reply brief to defendant's post trial brief makes no mention of any facts established at the trial which bear upon the court's determination of the legal issues addressed in plaintiff's claims for injunctive and declaratory relief.

As concerns plaintiff's claims for injunctive and declaratory relief, plaintiff's legal arguments were first presented in the form of a motion for summary judgment and brief in support thereof. As this was filed shortly before the trial, plaintiff, at trial agreed, that this brief should be considered as her trial brief. The Department then filed a post trial brief in response to this, to which plaintiff responds by way of reply brief.

As previously indicated, plaintiff's case for injunctive and declaratory relief addresses the statutory authority for and constitutionality of certain provisions of the Department's Minimum Rules enacted pursuant to the Child Care Act, in addition to the constitutionality of one provision of the Act itself.

In light of these claims, the court, at the outset, notes that agency rules are to be given "great deference" by the courts. Traveler's Indemnity Company vs. Barnes, ___ Colo. ___, 552 P.2d 300 (1976). The courts have also held that agency regulations are presumed valid and constitutional and that this presumption "is not to be lightly cast aside by mere allegations in a complaint of unconstitutionality." Moore vs. District Court In and For the City and County of Denver, 184 Colo. 63, 518 P.2d 948, 951 (1974). In Moore the court went on to resolve the issue of burden by saying that:

> The burden is upon the party challenging the constitutionality to establish by a clear and convincing showing beyond a reasonable doubt the asserted invalidity.

Moore, supra.

Again, the court concludes that plaintiff herein has failed to carry this burden.

The issues raised by plaintiff in her action for declaratory and injunctive relief and the court discussion thereof follow.

A. Is Section A-7416 (Entitled Program) of the Department's Minimum Rules and Regulations for Child Care Centers in Excess of Statutory Authority, Vague or Unconstitutional?

At the outset, the court notes that plaintiff's briefs refer to the Program section of the Minimum Rules as section D-7116. However, as noted by counsel for the Department, effective September 30, 1975, these regulations were revised and are now found at section A-7416.

The court also notes that plaintiff is expressly not contending the issue of whether or not the Child Care Act constitutes an unlawful delegation of rule-making authority to the Department (plaintiff's reply to defendants' post trial brief, p. 3). The court therefor concludes that C.R.S. 1973, 26-6-106 makes a valid delegation to the Department to promulgate rules and regulations.

Plaintiff, however, contends that the Department in promulgating certain provisions of its Minimum Rules has acted in excess of the authority of the CCA.

1. Is Section A-7416 in Excess of the Child Care Act?

It is a well-settled maximum of administrative law in this jurisdiction that an agency regulation must be within the scope of and not exceed the statutory delegation of authority to the agency. Traveler's Indemnity Company vs. Barnes, ___ Colo. ___, 552 P.2d 300 (1976).

Plaintiff's primary objection to section A-4716 of the Minimum Rules is that the section is an alleged attempt by the Department to regulate the educational program of child care centers. Plaintiff seems to argue that this section requires or imposes specific educational standards for the instruction of the children within the centers. Plaintiff then concludes that the Child Care Act does not permit such regulation and therefor this section is ultra vires.

The court has determined that it need not decide the theoretical question of whether or not the Child Care Act was intended to permit regulation of a center's educational program. Instead the court having reviewed section A-4716 finds that nothing in this section establishes any specific educational standards. The Department in its post trial brief (pp. 11-16) has analyzed each of the subsections and paragraphs within section A-7416 specifically pointing out the statutory authority therefor in C.R.S. 1973, 26-6-106 of the Act. Therein, the Department further justified the rational for each of the regulatory provisions in terms of the Department's unquestionable public interest in the uniform regulation of child care within the State.

As long as police power such as we have here is "exercised for an end which is in fact public" and the means adopted are "reasonably adopted to that end," then private vested rights, obligations of contract, and the like must yield to the legislative exercise for the general good. Triple_X_Arms_Homestead, 297 U.S. 189, 197 (1936). It is equally true that only if a statute or regulation "enacted to protect the ... common welfare has no real or substantial relation to that object will courts interfere with it." Colorado_Anti-Discrimination_Commission_vs_Case, 151 Colo. 235, 380 P.2d 34, 41 (1965).

In light of the Department's analysis of the section A-7416 the court concludes that the section is within the statutory authority of the Child Care Act and, furthermore, constitutes a valid exercise of the police power.

2. Is subsection A-7416.1 Impermissibly Vague?

Plaintiff contends (plaintiff's brief in support of motion for summary judgment at pp. 26-29) that subsection A-7416.1 is impermissibly vague in that the terms "program," "suitable," and "needs" are nowhere defined therein. This subsection provides that:

> The center shall carry out a planned, written program suitable to the needs of the children. This program shall be available for evaluation when requested by the state department.
>
> 1. The program shall include outdoor play each day except when the severity of weather makes it a health hazard or when there is an individual reason for a child to remain indoors.
>
> 2. School age children shall have specifically planned activities and shall, with parents' permission, participate in supervised visits and recreational activities in the community.

(emphasis added).

Having reviewed the entire record including the plaintiff's vagueness argument, the court finds that there has been no showing whatsoever as to how plaintiff has been or might be damaged by this allegedly vague subsection. There is no evidence before the court that a center's failure to have a "suitable program" would cause the Department to initiate action regarding the center's license. In fact, the Department's action refusing to renew plaintiff's license was based solely on her refusal to permit inspection of the center. Finally, there was no testimony presented at the trial regarding how

plaintiff believed this subsection to be vague.

The court is aware of the ruling in Colorado State Board of Optometric Examiners vs. Diano, 165 Colo. 488, 440 P.2d 287 (1968), where the supreme court held that no longer must

> [a] person adversely affected by a statute and seeking relief from uncertainty and insecurity with regard to his rights by reason of a statute or rule of a board or commission ... take the risk of prosecutions, fines, imprisonment, loss of property or loss of profession in order to secure adjudication of his rights."

However, the court finds there has been (1) no proof that plaintiff is "a person adversely affected" by subsection A-7416, (2) no factual establishment of plaintiff's uncertainty or insecurity" with this subsection, and (3) no showing of "risk of loss."

The court, here, feels the instant claim is controlled by Heron vs. City and County of Denver, ___ Colo. ___, 411 P.2d 314, 315 (1966), wherein the court held:

> The complaint (under Colo. R. Civ. P. 57) must therefore state a question which is existent and not a mere academic or nonexistent question. In other words, there must be a justiciable issue or a legal controversy existent, and not a mere possibility that at some future time such a question may arise. Moreover, a declaratory judgment is appropriate when it will terminate the controversy. Here, no controversy exists, at most, there is only a mere probability of such.

Similarly, the court, here, finds no actionable controversy.

> 3. Does Section A-7416 Work a Denial of Plaintiff's Substantive Due Process Rights?

The court finds it axiomatic that every regulation must bear a reasonable relationship to a valid governmental objective. Love vs. Bell, 171 Colo. 101, 447 P.2d 118 (1970).

Plaintiff argues that there is no valid governmental

interest served by section A-7416 of the Department's Minimum Rules. It is unnecessary to cover old ground in this area. The court's earlier holding that this section is a valid exercise of the police power is determinated of this issue. Furthermore, the court concludes that the Department has a valid interest in attempting to insure that children be exposed to some minimal stimuli and recreational equipment when they are cared for out of their homes for extended periods of time by unrelated individuals. This is particularly true when the care is being provided for by proprietary enterprises, such as plaintiff's, who could increase profits if not required to maintain minimal furnishings for the children. The court is not suggesting that plaintiff is so motivated, however, the profit incentive to curtail costs at the expense of the child's health, safety and welfare is a furtner reasonable rational for section A-7416.

D. Is Section A-7412.3 (entitled Children's Records) of the Department's Minimum Rules in Excess of Statutory Authority or Unconstitutional?

Plaintiff in her brief in support of motion for summary judgment initially seems to argue that section A-7412.3 entitled Children's Records allows the Department to inspect "any and all" records of plaintiff regarding the children in her facility (p. 34). The Department's post trial brief addressing this statement by plaintiff took exception by pointing out the specific language of the regulation where no such all encompassing statement appears. Section A-7412.3 provides that:

> The day care center shall maintain a record on each child which shall include:
>
> 1. The child's full name, birth date, and current address and date of enrollment.
>
> 2. Name, home and employment address

and telephone number of parent(s), or the person(s) legally responsible for the child.

3. Telephone numbers or instructions as to how the person(s) responsible for the child may be reached during the hours the child is at the center.

4. Names, addresses and telephone numbers of persons authorized to take the child from the center.

5. Names, addresses, and telephone numbers of person(s) who can assume responsibility for the child in the event of an emergency if parent(s) or guardian(s) can not be reached immediately.

6. Name and address of child's physician and dentist.

7. Health information including medical reports, chronic physical problems, vaccination and immunization history and pertinent social information on the child and his family.

8. Written authorization from parent(s) or guardian(s) for emergency medical care.

9. Written authorization from parent(s) or guardian(s) for the child to participate in field trips or excursions, whether walking or riding.

10. Injury and illness record.

11. Reports of accidents requiring hospitalization, or the occurrence of death of a child.

12. Significant observations of the child's development.

(emphasis added for subsequent reference). The court, having reviewed this regulation, agrees with the Department that the regulations do not seem to permit inspection of "any and all" records.

Plaintiff then in her reply to defendant's post trial brief focuses her concern on section A-7412.3(7) and (12) which have been underscored above.

The essence of plaintiff's argument is that these

provisions are in excess of the statutory authority granted the Department by the Child Care Act and violate the privacy rights of the children and their parents.

On the issue of statutory authority the court notes that C.R.S. 1973, 26-6-106(2)(h) permits the Department to promulgate rules regarding the "maintenance of records pertaining to the admission, progress, health, and discharge of children" within child care facilities. (emphasis added). On the basis of this authority the court concludes that section --7412.3(7) and (12) which relate to health information and the child's development, respectively, are clearly within the scope of the Child Care Act (brief in support of motion for summary judgment, pp. 36-37).

Plaintiff further argues that the Child Care Act does not permit inspection of the facilities records but only of the facility itself. The court finds this argument utterly without merit. C.R.S. 1973, 36-6-108(2)(g) provides that the Department may take action on a facility's license should the licensee "refuse to submit to the department any reports or refuse to make available to the department any records required by it in making investigation of the facility for licensing purposes." (emphasis added).

The court notes that plaintiff raises the issue of the reasonableness of the Department's inspections in her claims both under Judicial review and Colo. R. Civ. P. 57 and 65. The court's ruling on this issue in the judicial review portion of this order is conclusive here. The court finds no evidence to support plaintiff's contention of unreasonableness.

Plaintiff's final argument with section A-7412 is that it works an unconstitutional infringement on the privacy rights of children who attend her facility and their parents. On this issue, the court notes that "not all constitutional

rights are absolute. When rights come into conflict, one must of necessity yield." People vs. Blue, ___ Colo. ___, 544 P.2d 385 (1974). See also Augustine vs. Colo. Dept. of Revenue Motor Vehicle Division, 565 P.2d 933 (1977). Even assuming parents and children have not made a limited waiver of their right to privacy by releasing information to plaintiff's child care center, the court finds that "conflicting rights" are present in this case. Here, we have the individuals alleged right to privacy and the Department's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of children cared for by child care facilities. The court, finding nothing unreasonable concerning section A-4712, concludes the privacy right must yield to the greater interest of the Department.

Furthermore, the court notes that this alleged invasion of privacy is minimal. Section A-7412.3 requires only that the facility maintain records on its children. It does not require all of the records be copied and forwarded to the Department. The Department only inspects the records to insure itself of their existence, not to assimilate or reproduce the informational content thereof. The factual information actually provided to the Department is done so on a form CWS-5737(B) (introduced at trial as exhibit II) which is limited to a listing of the names of the children in attendance at the center followed by a series of checkmarks to indicate whether or not the required records were on file at the center.

In view of the court's disposition of this issue on its merits, it specifically declines addressing the issue of plaintiff's standing to raise the constitutional rights of the parents and children.

C. Does C.R.S. 1973, 26-6-102(1)(a), as Amended, Violate Respondent's Right to Equal Protection of the Laws.

At page 45 of her brief plaintiff states that section 26-6-102(1)(a), as amended, denies plaintiff the right to equal protection of the laws because it discriminates "between private child care centers regulated by the State Department of Social Services, and child care centers operated in connection with a public school." This argument is frivolous.

It is clear that the constitutionality of legislative enactments is presumed. Johnson vs. Division of Employment, ___ Colo. ___, 550 P.2d 334 (1976). Furthermore, the burden is upon the assailant of the statute to prove it unconstitutional beyond a reasonable doubt. Johnson, supra.

Where the constitutional infirmity, as here alleged, is the denial of equal protection, a determination must be made at the outset regarding the appropriate standard for review. Harding vs. Industrial Commission, 183 Colo. 52, 515 P.2d 95 (1973). As in the instant case where "neither suspect classifications nor the infringement of fundamental rights are involved, a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Johnson, supra, P.2d at 336.

Furthermore, when a business or occupation has become subject to the police power of the state, any classification made in the exercise of that power will be upheld unless unreasonable and arbitrary. Antlers Athletic Ass'n vs. Hartung, 85 Colo. 125, 274 P. 831 (1929).

1. C.R.S. 1973, 26-6-102(1)(a), as amended, makes no distinction between private child care centers regulated by the State Department of Social Services and child care centers operated in connection with a public school.

Probably the most basic requirement of a claim under the fourteenth amendment alleging a statutory denial of equal protection is that there be a statute which treats one class different than another. While plaintiff alleges this to be the case with section 26-6-102(1)(a), as amended, plaintiff's claim becomes immediately suspect when on page 45 and 46 of her brief she admits:

> On its face, 26-6-102(1)(a) appears to be impartial, applying equally to public and private day care centers which accommodate children under kindergarten age .... Thus, on the face of the statute, the State Department of Social Services is given authority to regulate all day care facilities, public or private, which accept children under the age of six.

(emphasis in original).

Plaintiff apparently realizing that a class distinction is a prerequisite to an equal protection claim, attempts to manufacture such a distinction where on the face of the statute, she admits that no such distinction exists. To this end plaintiff alleges that section 22-32-118(2)(d), as amended, by implication repeals the application of C.R.S. 1973, 26-6-102(1)(a) to child care centers operated in connection with a public school.

Section 22-32-118(2)(d), as amended, was adopted by the legislature in 1975 as enabling legislation to permit school districts to "establish and maintain preschool programs in connection with the schools of its districts." For some reason unbeknownst to the court, plaintiff feels that the "unmistakable conclusion" is that because school districts may, pursuant to 22-32-118(2)(d) now maintain preschools, that the Child Care Act does not apply to such

preschools. The court notes that the Department contends that in its opinion the "unmistakable conclusion" is to the contrary and that there is no reason to believe that preschools operated in connection with public schools are not legally subject to the Child Care Act. Furthermore, the testimony of Ms. Kester at the trial was that the only two such preschools that she is aware of established under section 22-32-118(2)(d) are both licensed under the Child Care Act.

The court agrees with plaintiff's interpretation of the Colorado law regarding repeal of statutes by implication; such repeals are not favored. Schwenke vs. Union Depot, 7 Colo. 513, 4 P. 905 (1884). Only when there is an "irreconcilable or substantial conflict" between two statutes will the former in time be declared repealed. Thompson vs People, 135 Colo. 336, 316 P.2d 1043 (1957). Furthermore, there is a presumption "that all laws are passed with knowledge of those already existing and that the legislature does not intend to repeal a statute without so declaring." City and County of Denver, 148 Colo. 441, 366 P.2d 548 (1961).

In light of the above, the court concludes not only is there no "irreconcilable or substantial conflict" between the Child Care Act and section 22-32-118, there is no conflict at all. Clearly, the Child Care Act applies to preschools operated in connection with public schools. Certainly, the General Assembly was well aware of the Child Care Act in 1975 when C.R.S. 1973, 22-32-118(2)(d) was enacted. If at that time the General Assembly felt the Child Care Act should not apply to such preschools it would have expressly so stated. In absence of express repeal or a conflict between the statutes, the Child Care Act applies to public school preschool as well as private day care centers. There is no class distinction made by the Child Care Act in this regard.

2. There is no Evidence of Discrimination Between Private Child Care Centers and Preschools Operated in Conjunction with Public Schools.

Even if it is assumed arguendo that the Child Care Act is not applicable to preschools operated in connection with public schools, there is no evidence of dissimilar treatment between the State's requirements for private child care centers and the school district's requirements for its preschools. At page 47 of her brief, plaintiff states that "the regulations and practices of the individual Boards relative to child care facilities are much less constrictive and detailed than are the regulations and practices of the State Department of Social Services in controlling private day care centers." In support of this statement plaintiff references to an appendix B, which allegedly purports to be a copy of the Jefferson County Board of Education - Rules and Regulations. As this document was never offered as evidence at trial, plaintiff's statement concerning the dissimilar treatment is entirely without factual support.

3. The Classifications Allegedly Created Between Private Child Care Centers and Preschools Operated in Connection With Public Schools are Reasonable.

Even if it is assumed arguendo that the Child Care Act makes a class distinction between private child care centers and those operated in connection with a public school and further, that the two classes are regulated in different ways and still further that this discrimination works to the disadvantage of the private care center, plaintiff still fails to state a claim under the fourteenth amendment.

In a recent decision by the supreme court, the court addressed the legality of a regulation of the Department of Health which placed certain health restrictions on commercial

importation of pets for resale and exempted from the restrictions noncommercial importation where said importation was for breeding purposes or personal use. Winkler v. Colo. Dept. of Health, ___ Colo. ___, 564 P.2d 107 (1977).

Citing several recent decisions of the United States Supreme Court, the court in Winkler stated that:

> Insofar as the health standards imposed upon all commercial pet sellers constitute a form of economic regulation by the state, the judicial scrutiny ceases when it is determined that the distinction has a reasonable basis and services a legitimate state goal.

Winkler, supra, at 109, 110 (emphasis added).

That there exists a "reasonable basis" for a distinction between private centers and those connected with a public school is manifest. In a private center children, without regulation, would be left to the whim of the, in this case, proprietary operator of the facility. In the case of a preschool operated in connection with a public school there is no profit motive. Furthermore, the operation of the preschool would be subject to the control of the local school board, who in such capacity act as public officials and thus are presumed to act with the best interests of the preschool children in mind.

A further basis for distinction lies with the fact that while the focus of the Child Care Act is with pure custodial care, section 22-32-118(d)(2) deals with preschools. The focus of a preschool is not custodial care of a child while its parents are at work but rather education of the child.

As held in Winkler once the reasonableness of the distinction is shown, the only remaining test of the validity of a statute is whether it "serves a legitimate state goal." In Winkler the court held that the public protection from diseases and parasites communicable to humans is such a

legitimate state goal. The General Assembly has expressed its concern for the comfort, care, well-being, and safety of children attending child care centers. C.R.S. 1973, 26-6-106(2)(e). The court finds the stated purpose of the Child Care Act to be a legitimate state goal.

In light of the above considerations, the court concludes that C.R.S. 1973, 26-6-102(1)(a) does not work a violation of plaintiff's rights to equal protection under due le-.

Plaintiff's final argument (plaintiff's brief in support of motion for summary judgment, p. 48) is that treating children in private and public facilities differently above and below the age of six years creates an arbitrary and totally irrational and impermissible classification. The court concedes it does not understand precisely what plaintiff has in mind here. However, the court is unpersuaded. The court finds no evidence in the record of unequal treatment. Furthermore, the court notes this issue was not raised in plaintiff's pretrial statement nor at the trial. Therefore, this issue is not properly before the court.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the court as follows:

1. Judgment enter, affirming the agency action of the Department pursuant to section 24-4-106(7).

2. Judgment enter in favor of the Department and against plaintiff dismissing plaintiff's complaint and amended complaint and all claims for relief asserted therein.

3. It is further ordered that the court's previous order to postpone or stay the agency action is dissolved, that plaintiff surrender her provisional license to the Department and that an injunction pursuant to C.R.S. 1973, 26-6-111, issue against plaintiff, enjoining her from further operating a facility which is required to be licensed by

C.R.S. 1973, 26-6-101 et seq., as amended, without a valid license.

4. The court further orders plaintiff to pay to defendant the costs of the transcript of the agency hearing. Defendant shall provide the court with a written statement of such cost.

DONE this 22th day of June, 1978.

By the Court:

District Judge

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 21st day of June 1978, addressed as follows:

Edward W. Sendelow
1115 Grant Street
Denver, Colorado 80203

END OF DOCKET